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PRINCIPLES
OF
MERCANTILE LAW,

IN THE SUBJECTS OF
BANKRUPTCY, CAUTIONARY OBLIGATIONS, SECURITIES
OVER MOVEABLES, PRINCIPAL AND AGENT, PARTNERSHIP,
AND THE COMPANIES' ACTS.

BY
RICHARD VARY CAMPBELL, M.A., LL.B.,
ADVOCATE.



EDINBURGH:
W. GREEN, 18 ST. GILES STREET.
1881.

EDINBURGH:
PRINTED BY LORIMER AND GILLIES,
31 ST. ANDREW SQUARE.

PREFACE.

THESE Lectures were delivered some time ago for the Institute of Bankers in Scotland, and they were taken down in shorthand as they were spoken. In preparing this volume for publication, I am aware that there remain many more traces of its origin in spoken speech than are usual in Law Lectures; but this I do not altogether regret. The forms of oral exposition suit the strictly practical aim which I have throughout had in view, to present the leading principles of some branches of mercantile law, with such explanations and illustrations from cases decided by the Courts, as seemed necessary to their operation being thoroughly understood. To help in this way towards a firm and intelligent grasp of these principles I have spared no pains; and I am encouraged to hope that my work, so far as it goes, may be of some practical use, not only by the reception accorded to the Lectures when they were delivered, but also by the fact of the present publication being made in compliance with a request from the Council of the Institute of Bankers.

EDINBURGH, *September*, 1881.

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LECTURE I.

BANKRUPTCY.

MR. CAMPBELL said,—I shall have, I doubt not, a little difficulty in attempting to make a popular statement of the law in regard to bankruptcy; but I know that I am addressing an audience of intelligent men who will take a little trouble with the subject. It is not a very simple subject, and it will require a little attention and a little thought, but these I know you will give. Without further preface I may at once say that the law of bankruptcy has for its aim the systematic regulation of what is to be done in these very unfortunate circumstances, when a man's assets are not equal to his liabilities. At this time of day it seems a very easy thing to notice what are the points that ought to be attended to in any system of bankruptcy law. We should say, in the first place, that the bankrupt is to be prevented from putting away his effects, from giving them away to friends, or ceding or conveying them away to favourite creditors. That object is attained by the common law of insolvency, and also by a series of statutes, mainly of the seventeenth century, to which I shall have to ask your attention. The protection of the estate against the insolvent is the first object that a bankruptcy law ought to have. The second object we may say is to secure that the funds shall be put into neutral hands for impartial distribution amongst all the creditors, so that individual creditors may not tear the estate in pieces by diligence. That can be attained at common law by the form of trust-deeds with which you are familiar; but it can also be

attained in a much better way by statute—namely, by sequestration in bankruptcy. Then there is a third point that we should think ought to be attained by any system of bankruptcy, and that is to secure due ranking of creditors upon the estate; for, of course, one creditor may be privileged, or may have a right to get full payment, while another creditor is only entitled to ordinary ranking. That object of ranking of creditors may be attained at common law; but it is generally attained with more perfection under the system of sequestration now existing. The fourth object is to secure the discharge of the debtor. That was for long only attained by a private trust or composition arrangement, or by the common law process of *cessio bonorum*. The existing statute as to sequestration also makes provision for that. These are the four heads of results which a complete system of bankruptcy may attain, and to business men as you are all, it seems an obvious thing that all these points should be attended to; but it was not by any means so simple to provide for these results, and the history of the law shows they were only gradually and successively attained in this country. The earliest thing that was done in bankruptcy law, was simply to prevent preferences—to prevent the bankrupt from giving away his estate to his friends, or to favourite creditors. That was done by the Act of 1621, cap. 18, and by the Act of 1696, cap. 5. But the law at that date seemed to think it had done enough, if it acted as a sort of bottle-holder to the creditors. It made no provision for any common process whereby the funds could be put into the hands of a neutral person to secure equal distribution; and, accordingly, the whole estate was left open to seizure on the diligence of individual creditors unless they all concurred in an arrangement by trust-deed. The first of a series of statutes aiming at a common process began in 1681, with reference to the sale and ranking on landed estates. The moveable estates remained until 1772 subject to no statutory process whatever for securing the equal distribution of the estate among the creditors. It was in 1772, that the first sequestration statute was passed. It has been followed by various others which I need not quote. The existing statute is that of 1856. The earliest sequestration statutes referred only to moveables, and although later sequestration statutes included landed estates, their benefits were confined to traders

exclusively. They did not extend to all debtors, but only to traders, and it was only after the Act of 1856, 19 & 20 Vict. cap. 79, that we have the bankruptcy law finally placed on a complete footing. We have it extended to all debtors, and including all kinds of estates, whether moveable or heritable—heritable being the word used in law for landed estate. With this statute and the aid of the old statutes of 1621 and 1696, and the common law, I think that we have now great perfection on the main points, and such a complete system of bankruptcy as I have already alluded to. You know that our system of bankruptcy, as established by the Scotch sequestration statutes, has been the subject of frequent approval by high authorities, both here and in England. Indeed our friends in the South have done us the honour, in their recent bankruptcy legislation, to copy some of the provisions which have been established and in use in Scotland, with additions which have been found to be disastrous.

That will suffice for a general introduction to the subject, and now I proceed to deal with the purely common law of insolvency. It is necessary, you see, to take up the subject in detachments. We have to deal with the common law apart, and then we shall have to proceed to the statutes. The first subject we have to deal with, then, is the common law of insolvency. Now, at the outset, I must ask you, in your thoughts as well as in your language, to distinguish between insolvency and bankruptcy. Insolvency, in law, is simply the state of a person whose assets are not equal to his liabilities. It may be that his estates, if realised, would equal his liabilities, as, for instance, when his estate mostly consists of consignments abroad, unrealised, but waiting realisation—yet, nevertheless, if at that moment he cannot pay 20s. per pound, that man in the eye of the law is insolvent. There are some niceties in law as to when a man is insolvent, which might be dilated upon; but I think, for practical purposes, I need not go into them here. What we are here concerned with is the mere state of insolvency, inability to pay debts. It is the foundation of the whole bankruptcy law; but you must understand that a man may be insolvent without being bankrupt, using the word “bankrupt” in its proper legal signification. Bankruptcy, as I shall show you afterwards, is a state depending

upon the application of certain tests supplied by statute. It is not merely insolvency; but insolvency with certain qualities, which I shall point out afterwards, to be found in the statutes. We are here, in the present place, dealing with the common law of insolvency. Now, the first and leading principle to be kept in view in regard to insolvency at common law is simply this, that from the moment of insolvency the bankrupt becomes, in the eye of the law, a trustee for his creditors. I do not say a trustee formally or technically. I mean by the expression "trustee," that his goods, in the eye of the law, belong to his creditors, and no longer to himself. He loses that uncontrolled administration of his goods which he had before his insolvency, and he holds them really for behoof of his creditors. That is the principle underlying all the common law of insolvency. The legal titles to the goods remain in him, no doubt; but you must understand that he holds them for his creditors, and anything he does in prejudice of his creditors' rights will be struck at by the law. So strongly is this the case, that the criminal law will reach the insolvent for his dealings with his own goods in certain circumstances. Fraudulent bankruptcy is a well-known point of dittay in the High Court of Justiciary. If an insolvent person has fraudulently away put, secreted, or concealed his effects with intent to defraud his creditors, that is a point of criminal dittay for which the insolvent may be tried before the High Court. Of course, that is the case of a man who is insolvent, knows he is insolvent, and with intent to defraud his creditors conceals his goods so as to put them absolutely out of the reach of his creditors, and so as to deprive them of the dividend to which they are entitled. For such an offence a man may be tried, and frequently men have been tried, but, perhaps, not so often as they ought to be. I do not know whether you are in the habit of referring to the law reports. If you wish to see what the law is in its practical working, I would strongly recommend you to get access to some copy of the reports. In a city like this, where there are so many law libraries, you can easily get the books; and I think it better to give you a reference to the latest case—*Clendinnen*, 3 Rettie, page 3, 2nd December, 1875. There you will find a most interesting discussion of the common law of insolvency, as applied in the criminal courts, against

any insolvent who attempts to defraud his creditors. The "Debtors (Scotland) Act of 1880," still further strengthens the criminal law of Bankruptcy. But we are most concerned with the civil law of bankruptcy, on the principle that from the moment of insolvency, the insolvent's estate belongs to his creditors. Proceeding upon that principle, the common law will set aside any preference he grants to a favourite creditor, or any donation to a friend, or any act in short, whereby he takes away his effects from their only lawful destination, as dividends to his creditors. In these matters we have settled in the practice of the Court the question that is to be raised, the form of the issue, in the challenge of a transaction forbidden by the common law of insolvency; and it is instructive as showing what the law requires, in order to sustain a reduction on the head of insolvency. The question put in regard to any transaction of the bankrupt struck at by the common law is this:—"Whether the said disposition was granted by the said A. B., and taken by the defender fraudulently to disappoint the rights of the creditors of the said A. B." You see that the question which is put to the jury in the case of a preference at common law is whether the deed in question, no matter what it is—it may be an indorsed bill or a delivery order, it may even be a payment of cash out of the ordinary course of trade, any extra security, any extra advantage given to a favourite creditor will be struck at in an issue of that nature—whether the deed was granted by the insolvent and taken by the defender fraudulently to disappoint the rights of creditors of the said insolvent? That is the question which is put. Now I may mention to you that there has been a dispute among lawyers as to whether it is necessary that the grantee, the person who receives the benefit, should be aware of the insolvency, and of the fraud on the creditors, or whether it is sufficient that the insolvent himself knew of his circumstances, and knew that he was putting away his effects fraudulently in favour of one particular individual. A judge of high eminence, the late Lord Justice-Clerk Hope, held in a leading case on the subject (*M'Cowan v. Wright*, 15 D. 494), that it was not necessary to prove anything more than that the insolvent person, knowing his circumstances, knowing that he had not money to pay all his creditors,

had given advantage fraudulently to another person, a favourite creditor. It was not necessary, he said, to show that the person who had received the advantage knew that there was insolvency or fraud. I do not know, however, that that can be accepted as an accurate statement of the law. I think the decision of the law in later times is to the effect that if you are to challenge the transaction at common law alone, you must show that not only the insolvent but also the grantee, the receiver, were both aware of the circumstances that insolvency existed, and that the man was unable to pay his creditors in full. If you can show fraud both in the giver and receiver, or if you can show not only that the disposition was granted by the insolvent but was taken by the defender fraudulently to disappoint the creditors, you can set aside any transaction by way of preference to particular creditors. In regard to the nature of the transactions which can be set aside, I shall have occasion to notice that more definitely when speaking of the Act of 1696, cap. 5, but they are generally all gratuitous alienations or transactions for the satisfaction or further security of a creditor out of the way of ordinary payment. The ordinary payment of a debt which is justly due and justly payable, will not be struck at either by the common law of insolvency or by the Act of 1696. It is the case of a bill not being due, and the holder of the bill getting suspicious, and demanding of the debtor a delivery order for goods not really sold or an assignation of his life policy, or something of that sort out of the ordinary course of business, that is struck at by statute or by common law. But at common law you must prove that in granting preferences, the bankrupt was acting fraudulently in the knowledge of his insolvency, and you must also show that the receiver knew or had good reason to believe that the preference which was given to him, was unjustly given to the prejudice of the other creditors. Keeping these requisites in view, I may say generally, that all the acts and proceedings of an insolvent which are struck at, as I shall show in more detail afterwards, by the Act of 1696, will also be struck at by common law, with this difference, that at common law you are bound to prove fraud as already stated, while under the Act of 1696 no proof of fraud is required. But all the acts or transactions struck at by the Act of 1696,

when done within sixty days of bankruptcy, will also be nullified by the common law of insolvency, provided in the latter case you can prove fraud on the part of the giver and receiver. Under the Act 1696 you do not need to prove fraud, you merely require to show that the insolvent acted contrary to the Act. That is the way the statute comes in to aid the common law. The common law is strong enough in its principles, but it requires to be sharpened as it has been by the Act of 1696. But before leaving the subject of the common law of insolvency, I think it right to notice to you one or two of the general effects which are produced upon the status of a debtor or indeed of a creditor, by insolvency. For instance, when you had bought goods formerly from a man and had even paid for these goods, if the seller of the goods became insolvent before delivery, the law ruled that you were only a creditor for delivery or for the money you had paid like any other creditor, and you did not get your goods. This rather seems an unjust rule; but that was the state of the law until amended by the Mercantile Law Amendment Act of 1856, which provides that when goods have been bought and paid for, the creditors of the insolvent cannot even by sequestration retain them against the purchaser; so that anomaly is removed (see *M'Meekin v. Ross*, 4 R. 154). That is one instance of the importance of insolvency as affecting the relations between purchaser and seller. Then there are other respects in which insolvency has an important effect. For instance, you know that during solvency a man may, by a post-nuptial settlement, provide for his wife and children to any extent he thinks discreet; but after insolvency his power to make such provisions ends; and provisions previously made will be reduced by the Court to what are reasonable. His discretion will not be considered, and his family arrangements after marriage will, on insolvency, be set aside in a question with creditors, except in so far as they are held reasonable and proper. In the same way a man may entail his estates, and appoint any heirs he pleases; but if he becomes insolvent that entail will fall altogether, because it is a general principle of law that no man can set aside his estate for his own benefit and thereby exclude his creditors. There are various cases in which men have attempted a proceeding of this sort. They have con-

veyed their funds to trustees, and directed their trustees to hold these funds for their use, and to hand it to chosen successors at their death. So long as a man who does this is solvent no one can interfere, however wise or foolish the action may be; but the moment the granter becomes insolvent, the creditors take that property. No man has a right by the law of Scotland to set aside his funds for his own benefit, and thereby to defraud his creditors. Just the other day in the Court, we had the case of *Souter Robertson* (4 R. 22). That gentleman when unmarried had assigned his property to trustees, reserving his own life-rent, and desiring them to come into possession of the lands at his death and hold them for behoof of any children he might have. He became insolvent, and on sequestration the creditors set this deed aside. It was quite competent for him, as for any solvent man, to give away his property absolutely and immediately; but what he had tried to do was to retain the benefit of his property to himself during life and his children after his death, and this was set aside when insolvency occurred. The only other example I think worth bringing under your notice is in the case of *Thomas v. Thomson* (5 M.P. 198). It is an interesting case for men of business. A man was cautioner for the builder of the Dundee New Infirmary. The builder began to get embarrassed in his circumstances. The cautioner entered in his book that the builder was quite insolvent, and thereafter the cautioner had to take up and go on with the contract himself; and what he did was to take a disposition from his debtor, thus insolvent, of property belonging to him. He said in effect, "I will take this property that you assign to me in security of the advances that I have made, or may yet make, for carrying out your part of the contract." It seems at the first blush a perfectly fair thing to do. He was getting no more than was his due. He was cautioner under the contract, and was liable to the managers of the infirmary for the execution of the buildings, and if his principal debtor had been solvent the transaction would have been perfectly good; but here the disabilities of insolvency came in which I have mentioned. He took this deed from the principal debtor when the principal debtor was insolvent, and when the principal debtor knew that he was insolvent, and when the receiver himself, the cautioner, also knew that fact.

So you see this was a case where the law ruled—"This man's funds should have gone equally among all his creditors (they belonged, in point of law, to all his creditors), and you, the cautioner, are not entitled to take a private deed from the insolvent to the prejudice of the other creditors, and therefore we shall set it aside." That is a good illustration of the way in which the law of insolvency works. You see there was a plain knowledge of insolvency both on the part of the insolvent and the creditor who got the advantage. As Lord Cowan said, "When a creditor takes securities for prior obligations with his eyes open, and knowing the state of his debtor's affairs, he does what at common law is a fraud, and to the prejudice of the other creditors."

I proceed now to the statutes. You will understand, of course, that the common law of insolvency regulates or has effect over the whole sphere of bankruptcy law; but in certain definite points it is aided, supplemented, and sharpened, by one or two statutes. The most important of these are two statutes of the seventeenth century. The first of these is the Act of 1621, cap. 18. In all these matters you will find in business that it is much better to go direct to the words of the statute, and not to trust implicitly to compilations that pretend to give you the sense of the statute. The meaning of old statutes like this is no doubt determined by countless decisions; but still if you wish to be sure of what you are doing, you must look to the words of the Act themselves. Now, the words of this statute are these:—It is declared that the Lords "will decreete and decerne, all alienations, dispositions, assignations, and translations whatsoever, made by the debtor, of any of his landes, teindes, reversions, actions, debtes, or goods whatsoever, to any conjunct or confident person, without true, just, and necessarie causes, and without a just price really paid, the same beeing done after the contracting of lawful debts from true creditors; To have beene from the beginning and to be in all times comming null, and of none availe, force, nor effect at the instance of the true and just creditor."

This in an Act which has been, of course, submitted to interpretation by the Court in many and many a decision, and the general effect of it is just a prohibition against gratuitous alienations by an insolvent person—to prevent an insolvent

from putting away his effects gratuitously into the hands of conjunct and confident persons. A conjunct person in the construction of the law, is such a person as a father, son, a stepson, an uncle, or a brother-in-law—near relations, in short. Confident persons, in the construction of the law, are persons such as law-agents—I mean the confidential law-agents of the insolvent—servants, agents in business, mercantile agents of the insolvent—any person, in short, who is connected with the insolvent by ties of intimacy and of business. The prohibition in this statute is against making alienations or conveyances of the insolvent's goods to conjunct or confident persons; against making these alienations in a state of insolvency to the hurt and prejudice of creditors—persons who are creditors at the date of the insolvency—without just, true, and necessary cause. If you like to take down the principal points of the Act, they may be stated to be four :—(1.), you must have insolvency at the date of the alienation ; (2.), you must show that the alienation is to the hurt and prejudice of prior creditors ; (3.), you must show that the goods are given to a conjunct or confident person ; and (4.), the deed challenged must have been given without true, just, or necessary cause. Now I warned you before that the subject was not quite an easy one, and perhaps, you think these details are rather embarrassing ; but the operation of the practical part of the statute is really quite simple. The trustee for unpaid creditors who were creditors in days prior to the alienation comes forward and shows that the debtor is bankrupt when he makes the challenge. He proves that the debtor at the date when he makes the challenge is insolvent ; then he shows also, that the deed which he challenges is granted to a conjunct or confident person, and that there are unpaid prior creditors. Now, when he has done that, the law presumes everything against the deed. It says, " You have shown that you represent creditors prior in date to the alienation ; you have shown that the receiver is a conjunct and confident person ; then we will believe, until the contrary is proved, this is a mere gratuitous alienation by the insolvent which cannot stand against true creditors." So you see the important help which this Act gives to the common law ; for although, by the common law, a deed to the man's father or brother-in-law, or confidential agent—when the debtor was insolvent at the

date of granting it—might be suspicious, there would be trouble in proving that the insolvent intended to defraud his creditors, and still greater difficulty in showing that the receiver was partaker in the fraud. This Act gets over these difficulties. It says, "Simply show that the receiver benefited is a conjunct or confident person; show that you represent creditors prior in date to the deed, and that the granter is now insolvent; and we will presume everything else in your favour, and set aside the deed." It will be set aside in these circumstances, unless the holder can prove that the granter was really solvent at the date of the deed, when there will be no reduction. I am quite entitled to make a gift out of my means to any relative, son, or brother-in-law, in solvency, which will be binding upon my creditors, if I make the gift out and out, as I may give a £5 note out of my pocket. I may give away my landed estate, or assign any portions of my means to third parties when I am solvent, and no man can challenge me. So if it can be shown by the receiver that the deed was granted when the debtor was solvent, the deed will be sustained. Then the other defence a receiver may have is, if he can show that the deed was granted for true, just, or necessary cause, or for a just price truly paid. If he can prove any of these things, then his defence will be sustained. That second defence rather limits the scope of this Act. If it is proved that the conjunct and confident person was really a creditor, and had right to get the deed, then the deed will be safe from challenge under this Act. In the case of *Thomson* which I mentioned to you, the pursuer could not touch the deed under the Act of 1621. The cautioner and the principal debtor were conjunct and confident persons, and the deed was granted in insolvency; but the holder of the deed was able to say that it was granted for true, just, and necessary cause; for it was granted in respect of the cautionary obligation which he had undertaken for the bankrupt; and therefore it could not be set aside under the Act of 1621. It was only at common law that it could be reduced by proving fraud on the part both of the granter and receiver. So you see this Act is limited in its effects. It was made to prevent gratuitous alienations, or the giving away of funds by the bankrupt—putting them into the hands of friends with the view, perhaps, of concealing them, at all events to prevent

the creditors getting at them. And that is not so uncommon a thing as one would imagine; for I have seen in practice, a man occupying himself, the year before his bankruptcy, in distributing his effects among his brothers. When his estates were sequestered, this house was found in the hands of one brother, another in the hands of another brother, a steamship in the hands of a third brother, and, indeed, the bulk of his property in the hands of his brothers. That is the sort of fraud that the Act of 1621 would strike at, and which is now punishable criminally by the Debtors' Act of 1880. The man whom I refer to carried on business, and, after making these alienations, when he was sequestered there was just an empty till, and nothing for the creditors. Proceedings were taken by reduction to set aside these conveyances, and they were reached under the Act of 1621, because they were held and presumed to be merely gratuitous alienations by an insolvent person to conjunct and confident persons without true, just, and necessary causes, or without just price paid. They were set aside, with the aid of the statutory presumptions, by proving insolvency at the date of the challenge, and that those moving in the case represented prior creditors, and that the conveyances were held by the brothers. There is thus a good deal of nicety in this statute; but it will not serve any good practical purpose to refer further to these niceties. It is only to be added that this statute is applicable to insolvency however long continued before the challenge. There is no limitation of time as in the Act 1696; it is a question of insolvency at any time. There must be insolvency at the date of the challenge, and insolvency back to the date when the deed was granted to conjunct and confident persons without true, just, and necessary cause, and then you can set aside the deed under this statute. When I speak of deeds I do not mean, under this statute or in the common law of insolvency, written papers; I mean any kind of transactions which transfer the estate of the insolvent. For instance, a deed that may be struck at under this Act may be a fraudulent consent to a decree in favour of a friend, a conjunct and confident person. Suppose a man to get up a fraudulent claim by way of action, and that the person against whom it is directed should allow his brother or friend, by neglecting to lodge defences, to get decree against him in default, that might

be reached under the Act. I have always found it difficult to get mercantile men to understand that; it is the reality and the substance of the transaction, and not the mere form, which is alone regarded in these questions of fraud. There is no one definite form to which the law restricts itself as the only form of fraudulent preferences. There is no form whatever, however circuitous, whereby a preference is got that will not be struck at either by the common law of insolvency or by the statutes. That, I think, is all I need say in regard to this branch of the important statute of 1621, cap. 18.

We have hitherto been dealing with insolvency purely. We are now about to take a further step, and to consider notour bankruptcy. I asked you at the outset to notice that insolvency was one thing, and that bankruptcy was another. We have now to consider what it is that constitutes bankruptcy. How does a man become a notour bankrupt? Notour is simply a Scotch word, meaning public. How does a man become properly subject to the appellation of a bankrupt? Now, as I mentioned, it is not always by sequestration. A man may become a notour bankrupt in one of several ways, which are defined by the existing Sequestration Act of 1856, section 7. I may mention that the Act of 1696, cap. 5, first of all introduced the definition of notour bankrupt; but that definition is now superseded by the wider and more practical definition, given by the existing statute of 1856. Now, here is the way in which a man becomes technically a bankrupt. The first case is simply that of a man being sequestrated in bankruptcy. That is the first and familiar case; but a man may become a bankrupt in other ways, and these are, first of all where you have insolvency. You must always begin with insolvency, and then, in addition to insolvency, you must have a charge for payment, followed by imprisonment. That makes a case of notour bankruptcy. I do not know whether it is your good or bad fortune to have much to do with bankrupt estates; but it is a very common plan when you wish to make a man notour bankrupt for some one of the creditors to give him a charge for payment, and then to cause the officer to take him into custody. There must be custody or imprisonment following upon a charge; but it is not necessary that the custody should be for more than five minutes. If the debtor is taken by the officer to the jail,

and there booked—his name entered in the list of persons in jail—that will be held as sufficient imprisonment to serve the purpose of the statute. Less, perhaps, might even do ; but that is the only secure way of doing it. In such a case there is insolvency, followed by the charge and by imprisonment, and that constitutes the peculiar state known as notour bankruptcy—a state of the utmost consequence in the bankruptcy law. That is one way you may do it ; but it may also be done, for instance, if you cannot get the man put in prison, and he absconds from diligence, or retires to the Sanctuary. That will make the man a notour bankrupt. Another case mentioned by the statute is, if he defends himself forcibly against diligence—knocks down the officer, or will not allow him to lay hands on him. These, of course, are rare cases, and perhaps it is not worth while going over the niceties, still it is right you should know them. If it is a case where imprisonment is incompetent or impossible, the other way to make a notour bankrupt is to execute an arrestment of the debtor's effects ; and if that arrestment is not loosed or discharged for fifteen days, then you have a notour bankrupt. The same result follows pouding of his moveables. Then, in addition to all these modes, it is also provided that insolvency concurring with the sale of any effects belonging to the debtor, under a pouding or sequestration for rent, will make a notour bankrupt, and so as to his retiring to the Sanctuary for twenty-four hours, or applying for cessio. There remains, however, one point to be noticed—how you can make a company notour bankrupt. You cannot imprison a copartnery. But this case is provided for by section 8 of the same statute. A company may be made notour bankrupt by any of the partners being rendered notour bankrupt for the company's debts. If you charge one of the partners for a company debt and imprison him on it, you would make the company notour bankrupt. You might also make the firm notour bankrupt by selling off any of the effects belonging to the company, under a pouding, as before. Now that imprisonment for debt is abolished, notour bankruptcy arises from insolvency concurring with an expired charge for payment.

Some of the most important effects of notour bankruptcy which I shall have to bring under your notice, are the

provisions in section 12 of the Sequestration Statute. The first point is that every arrestment or poinding that is executed within sixty days before the constitution of notour bankruptcy, or within four months after the debtor is made notour bankrupt, ranks equally. That is a most important effect of notour bankruptcy. This is one of the means introduced by the law for producing equality of distribution among creditors, and preventing one creditor running a race of diligence to seize a larger share of the effects than he is entitled to. Make a man bankrupt, and every diligence executed within sixty days before, or within four months after the bankruptcy, shall come in equally, or rank *pari passu*. In practice that is a most important effect, for no arrestment or poinding, executed within sixty days before sequestration, gives any preference; the sequestration is an attachment of the funds for the general creditors; and the trustee is to see that no one gets an undue advantage. In business it is often necessary, when you find a set of greedy creditors seeking to get the funds to themselves by using independent diligence, to prevent preferences by taking the simple form of making the debtor notour bankrupt, or at once to apply for sequestration. Indeed, it is one of the great reasons that the equalising processes of sequestration is applied for, that individual creditors are doing diligence. By making the insolvent a notour bankrupt within sixty days of the diligence you cut down all preferences so attempted to be obtained by individual creditors. We will not go further into this. We have seen enough to know what the state of notour bankruptcy is—it is insolvency concurring with certain requisites fixed by statute.

I now want to ask your attention to the Act of 1696, cap. 5. It is one of the most important statutes that we have to deal with in all bankruptcy law. Again, I first ask you to listen to the words of the statute which “Declares all and whatsoever voluntary dispositions, assignations, or other deeds which shall be found to be made and granted, directly or indirectly, by the aforesaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favour of his creditor, either for his satisfaction or further security, in preference to other creditors, to be

void and null." This statute is in old Scotch, but the substance is that any voluntary deed or act by the bankrupt within sixty days of his notour bankruptcy, shall be declared void and null, if that act is for the satisfaction or further security of a favourite creditor, to the prejudice of other creditors. It is not intended by this statute to prevent a man dealing *bond fide* in the ordinary course of business. It is not intended to stop his business within sixty days before notour bankruptcy. Other persons are quite entitled to go on dealing with him in the ordinary course of business. You may go on buying and selling with him, you may discount his bill, or take payment of his bill again, and be blameless, so long as it is done in good faith in the ordinary course of business. If you accept payment of a sum that is due, a payment that you are entitled to there and then, although it is done within sixty days of the bankruptcy, there is no harm in it. The thing that is struck at is a preference within sixty days before his bankruptcy, given in satisfaction or further security to a favourite creditor. By the term satisfaction you are to understand something different from payment. For instance, a man is owing me a sum of money which is due at a month's date. He cannot pay me, or I get suspicious of him, and I demand that he shall give me a delivery-order for certain goods, which I will set against it. That giving over of goods in satisfaction or for my further security is not payment. Or there is a bill that is on the circle, and I am one of the parties on the bill, and I begin to get afraid that the acceptor or principal debtor is not in a good way, and I insist that he give me an assignation of some goods or funds in case I be called upon to pay that bill. That assignation is for the further security of a creditor. Now it is that kind of transaction which is struck at by the Act 1696. It attacks preferences given voluntarily by the debtor, transfers which he could not by law and in terms of his contract be compelled to give at that time, and, therefore, out of the ordinary course of business, for the satisfaction and further security of the creditor; and, as I noticed before to you under this Act, you have not to prove anything of the nature of a fraud. You have not to prove that the debtor intended a fraud, nor that the receiver intended a fraud; all that you have to show is that the

advantage was given within sixty days of notour bankruptcy. No matter what was the intention of parties, if the act in itself is a voluntary act for the satisfaction and further security of a favourite creditor to the prejudice of the general creditors, it will be set aside. In the case of *Taylor v. Farrie*, 17 Dunlop, pp. 649, 652, you will find by the authority of the whole Court a most plain and distinct statement of the nature of transactions that are struck at by this Act; and, so far as I observe, among mercantile men the working of this Act is not understood. They do not draw distinctions well between things that may and things that may not be done within sixty days of bankruptcy. Three classes of transaction are not affected by this Act at all. *First*, It does not strike at what are called in law *nova debita*; that is to say, it does not prevent men from entering into a new transaction within sixty days, or lending, borrowing, buying, and selling within sixty days, or dealing generally with the bankrupt in the ordinary course of business. These new dealings within sixty days are called in law *nova debita*—new transactions. I may buy from the bankrupt within sixty days; he may buy from me, and may pay me my account quite regularly and fairly, and it shall not be struck at, if it is a new transaction in the ordinary course of business. Or I may lend the bankrupt money, and he may give me security over his house, or the policy on his life, or he may lodge bills with me in security of an advance. A bank may get bills pledged for advances if it is done within sixty days, and if it is a new transaction. That is not struck at. In short the meaning and intention of the Act is to prevent the man giving undue preferences for prior debts, and not to shut his door or prevent him carrying on business. *Second*, The Act does not strike at any payment in cash or by bill, or at transactions generally in the ordinary course of business. It does not prevent a man taking payment of his account, or the bank taking payment of a bill that has fallen due within the sixty days. If it is in good faith, done in the regular course of affairs, that is not struck at by the Act, see *Louden*, 5 R. 293. *Third*, This point is of more consequence to banks and everybody having to do with the lending of money. It does not prevent a debtor from granting any security within the sixty days, which he has agreed specifically to grant beforehand. If at the time when the loan is given, or

the advance made by the bank, or anybody else, it is stipulated that the debtor shall give certain definite security over certain definite subjects, and if he can be unconditionally compelled to grant that security, then the granting of that security the day before bankruptcy will not be objectionable under this Act. The distinction is that the security must have been stipulated at the time of the transaction, and the subsequent performance of the obligation only been delayed. In the same way, suppose a bankrupt has sold but not delivered goods before the sixty days, or has agreed to deliver in security certain goods before the sixty days, then delivery within the statutory period is not struck at, for it is merely carrying out a transaction stipulated for at the time, and there is no giving a voluntary advantage. But now I must mention the cases which this statute strikes at. *First* of all, if a bankrupt within sixty days gives security for a prior debt—for a debt contracted beyond the sixty days—where no security had been originally bargained for at all, it strikes at that. For instance, a bank lends money to a man to-day and takes no security at all. If, it may be months afterwards, no matter whether short or long, they come to the man and say, "You must give us some security for this advance," and they take security; and if the taking of that security falls within sixty days of the bankruptcy, that is struck at by the Act. That is not valid under the statute, because that is one of the cases provided for, an assignation for the satisfaction or further security of the creditor voluntarily given by the debtor, in a case in which he could not have been compelled, because it had not been agreed to grant it before the sixty days. The *second* point to be noticed, and I have prepared these notes specially with a view to your business, is that it will not protect a transaction if, at the time of the advance, it was merely agreed with the debtor that he must give some security, without specifying the security. An agreement to give a loan, with a further agreement by the debtor merely that he shall give some undefined security at a future time, will not protect the security if granted within sixty days. These, then, are two cases. If you originally grant a loan without making any bargain for security, the security will be bad if within sixty days; and if, at the time, you meant to get some security but did not specify it, and if the debtor gives you a security within sixty days, that is struck at. Our *third* class of securities annulled by the Act is a stronger

case, and it is worth your attention. It occurred with the Union Bank in 1851. If you take and deposit titles in the bank safe, a thing not unfrequently done, as securities at the time you give a loan or advance to a debtor, and you even take a letter from him, saying he will give you an assignation of these securities when required, yet if the assignation is required within sixty days it will be bad. That seems pretty strong law; but it is a warning to all bankers just to read the letter that was given in this case of the Union Bank. I refer to the case of *Moncreiff v. Hay*, manager of the Union Bank, 16th December, 1851, 14 Dunlop, page 201. The firm of Tod & Hill, W.S., had applied for an additional credit of £3000 to the Union Bank. The bank agreed to this advance, and Tod & Hill thereupon granted in their favour a promissory note, payable six months after date, for £3000. On the same date Mr. Tod addressed the following letter to the manager of the bank :—" I hereby agree to convey to you, at any time required, a bond for £4000, by Samuel Laing, Esq. of Papdale, in my favour, dated 31st January, 1838, and two policies for £2000 each effected with the Standard Life Insurance Company in August, 1844, upon Mr. Laing's life, and that in security of the £3000 in the promissory note of this date, by myself and Mr. H. D. Hill, to you as manager of the bank." That is a thing that might happen to anybody. The manager of the bank had obtained the bond for £4000, and two policies for £2000 each, along with this letter binding the debtor to convey to the bank, at any time required, these securities. This was done in June, 1847, and on 17th December following, the bank asked the debtor to grant an assignation of the securities which they held deposited in their hands. The debtor gave them the assignation on the 17th December, 1847. Sequestration took place on 23rd December, so that the assignation was granted within six days of bankruptcy. In this case the Court held that the security was struck at by the Act 1696. They said this was not a case of stipulating for absolute security; it was contingent whether or not the bank should take the security. They said in effect—" You got no security; you trusted to getting it in time; you left it contingent whether or not you would take the security; and, having done that, your taking security within sixty days of bankruptcy is struck at by the Act 1696, and it will not do." Hear what the Lord

President said in giving judgment :—" The Union Bank might have made themselves perfectly secure by obtaining an immediate assignation of the bond and policies ; but that was not the nature of the transaction. They took from Mr. Tod a letter by which he obliged himself to grant an assignation 'at any time required.' The bond and policies, no doubt, were deposited with them ; but that was of no avail without the assignation. Till within six days of the bankruptcy there was no requisition. Is it not plain that if this letter, together with the depositions of the bond, did not operate the assignation—if it was not out and out a complete transaction—it was of no use ? The assignation was avowedly granted to complete the security, and it is therefore, in the very words of the statute a deed granted for 'further security' of the bank." And so they set aside the assignation, and the bank lost the security in consequence. You see I am not losing time in particularly calling your attention to this case. The only way in which security granted within sixty days of bankruptcy will be good is when it is specifically stipulated for at the time when the loan is made, and not left contingent. "If the party come under an obligation to do something immediately and unconditionally, it shall have the effect of creating a good security ; and when I say come under an obligation, I mean nothing short of this, that he subjects himself to an obligation instantly and absolutely enforceable," see *Steven v. Scott*, 9 M. 923, per Lord Justice Clerk. I may add this warning, because one is apt to be misled by English rules that mere depositions of writs or title-deeds in the hands of a bank or lender of money is of no use in security of money lent. In England it is a different thing. The bankers in England are safe enough in lending money on clients depositing securities in their hands. In Scotland you are not safe. Depositing a title gives no right whatever. In this case the Union Bank had the titles in their hands. In short, if you wish to be secure, take the assignation at the moment of the loan, or have a bargain that you are to get an assignation absolutely of a specific subject or security. It must not be a promise of security in general, or security contingent upon your thinking it worth while to ask it afterwards ; it must be absolute and specific security. That is well brought

out in the case of the *Bank of Scotland*, 7th February, 1811 (Faculty Collection). It is a contrast to the *Union Bank* case. In the case of the *Bank of Scotland* the titles were handed over to the lender, with an obligation to grant a security deed—the only delay being the delay of drawing out the deed. The deed was not executed or completed till within the sixty days; but it was sustained by the Court. There was an undertaking for a specific security to be granted absolutely without condition, and without subsequent requisition, and though granted within the sixty days it was held to be good. For further illustrations of these distinctions see *Rose v. Falconer*, 6 M. 960, and *Gourlay v. Hodge*, 2 R. 738. The *fourth* point is that even payment by cash or by bill, out of the ordinary course of business, will be struck at by the Act. If an account is not due, or a bill is not due at the time, and yet payment is taken in cash within sixty days, that will be struck at by the Act. Any transaction that is out of the ordinary course of business, that indicates in some way want of good faith or knowledge that the man is in failing circumstances, will be struck at by the Act. The *fifth* point to which I wish to draw your attention is, that in every case of getting security you must see that the appropriate steps for fully completing it are taken, whether these be sasine, registration, intimation, or delivery. It is the date of such completion which is the date of the security under the Act 1696. Suppose you get a security eighty days before bankruptcy, if, nevertheless, you do not complete that security by registering it (if that be the proper form) till within the sixty days, it will be treated as if granted at the date of registration. You thus observe the necessity for completing securities after getting them. If you leave a bond unrecorded, or a transfer unrecorded for any time, you always run the risk that the actual completion of the security will come within the sixty days; and then the transaction will be treated as if it had taken place at the date of recording the deed, and the security will be good or bad under the Act 1696 according as it was or was not in the power of the debtor to grant it as at the date of its actual completion. Provisions analogous to those of the Act 1696 as well as of the Act 1621 are parts of every bankruptcy system, and they will be found for England in sections 91 and 92 of 32 & 33 Vict. c. 71—see *ex parte Topham*, 8 Ch. App. 614, and *Butcher v. Stead*, 7 E. and I. App. 839.

LECTURE II.

GENTLEMEN,—The subject with which we begin to-night is that of Sequestration. Sequestration, then, you must understand, is a law term signifying the setting apart or deposition in neutral custody of some estate in dispute. For instance, it is applied in law to the setting apart of landed estates when there is any competition as to the succession to them; or again, when the partners of a dissolved firm are unable to agree as to winding up its affairs, the Court may sequester—that is to say, set the estate apart for winding up and liquidation by an officer of Court. What we have to deal with to-night is the case of sequestration in bankruptcy. A characteristic feature of that sequestration is, as in all cases of sequestration, the setting apart of the funds in the hands of a trustee for behoof of the creditors. While that is the characteristic of sequestration, there falls to be added to it the great advantage which statutory power gives over common law, namely, that all the creditors are compelled to acquiesce in common measures for the common benefit. You will find, in considering the common law of insolvency which we have yet more particularly to notice, that the actings of creditors with a view to a composition arrangement are mainly voluntary. The benefit of the sequestration statute is that statutory majorities of creditors are enabled to enforce what measures they think best for the common benefit upon dissenting minorities, and that the procedure is fixed and regulated by statute. Sequestration is a judicial process commenced by decree either of the Sheriff Court or the Court of Session, and it is carried on throughout by a trustee acting under the orders of creditors, but subject always to the supervision of the Court on appeal. It is believed by most lawyers both in England and in Scotland who have had an opportunity of studying the subject, to be a process of great utility and of great

value; and indeed one of our English friends, a barrister of the name of Gill, in the year 1859, indicated rather an amusing preference for the Scotch form of sequestration. Being pressed by his creditors in England, he took it into his head to come down and reside in Scotland. He chose the remote village of Tobermory, in Mull, in which to reside; and then, after forty days' residence, he caused himself to be sequestrated as William Gill, residing in Tobermory, in a Scotch sequestration, and, strange to say, the Court of Session sustained that. Of course his creditors were in England and did not easily know who was this Gill, of Tobermory; but he had established a jurisdiction in Scotland, and in this way got the benefit of our sequestration statute. The like of that has been put an end to by recent statutory provisions. No one, seeking the benefit of Scotch sequestration, will get it if the Court is satisfied that the majority of the creditors reside in England. The general features of sequestration are fit to be brought under your notice. The first is how sequestration may be obtained, and by whom. Well, it may be obtained by any debtor who gets the concurrence of a creditor of the value of £50, of two creditors of the value of £70, or of three or more creditors of the value of £100. They present a petition to the Court and sequestration is granted; and it is from the date of the first deliverance in sequestration that its effects operate. You will consequently find in business that the date of the first deliverance in sequestration is a most important point to be attended to. If the debtor will not consent to sequestration, which sometimes occurs, then the only resource of the creditors is to make him a notour bankrupt in the manner which I have already explained. The debtor being made a notour bankrupt, any creditor or creditors of the amount mentioned may present a petition for sequestration and obtain it. Sequestration being granted, the next step in the proceedings is to advertise the first meeting of creditors. At that first meeting the trustee is elected, and he is to find caution for his intromissions. Commissioners are also appointed by the creditors to act along with him and to advise with him in the conduct of the business. The next important step in the sequestration is to secure the examination of the bankrupt, in order that he may be forced to disclose

what he has done with his estate, and to account also for the manner in which sequestration has become necessary. He is now subject to punishment if he fails to attend for examination. In addition to that, it may also be necessary to examine such persons as agents or factors, or servants of the bankrupt, in order that the trustee may be put into the position of ascertaining fully and fairly what has been done with the estate, and what can be made out of it for the benefit of the creditors. It is a provision of recent legislation that such examination will be granted by the English Court of Bankruptcy, or the Irish Court, upon application by the trustee in the sequestration. In the same manner we grant facilities in an English bankruptcy for the examination of all persons whose evidence may be required by the English Bankruptcy Court. After the examination in bankruptcy and such other examinations as may have been required by the trustee, another step in sequestration is the second meeting of creditors, at which the creditors may give directions generally for the management of the estate. Their powers are specified by the statute. They receive a report from the trustee of the state of the affairs of the bankrupt, that they may judge what ought to be done as to the administration of the estate. Thereafter the trustee is left in possession of the estate, and he manages it with the advice of the commissioners. The commissioners are three gentlemen, usually creditors or mandatories for creditors, who are chosen by the meeting. I do not know that their appointment is of so much practical consequence as it might be, did they generally trouble themselves to supervise; but it is a statutory requisite. Then the trustee is ordered to proceed with the realisation of the estate, and the first thing the creditors look for is the appearance of a dividend. It is provided that the first dividend must be made at six months after the date of sequestration; and in order to make that dividend, the trustee has, within four months after sequestration, to examine the claims of creditors lodged with him and to adjudicate upon them. In doing that he is armed with statutory powers to take evidence if he thinks necessary; and according as he admits or rejects a claim, an appeal may be taken by creditors to the Sheriff, or to the Court of Session, in order to get his decision reviewed. The appeal is simple and not costly. There is, by this means,

supervision exercised by the Court over the ranking. The trustee is to adjudicate upon the claims, and a dividend must be paid in six months after the date of sequestration, unless the date is postponed by the Commissioners. The like procedure takes place with regard to future dividends. The second dividend must be made at ten months' date from the sequestration, and subsequent dividends are to be made at intervals of three months each. That provides for the ranking of creditors, and other provisions of the statute are directed to the discharge of the bankrupt. That may be done in two ways, each differing very materially, and the difference between them, I think, is not so often adverted to as it ought to be in business. The one is a discharge upon composition—composition which is offered by the bankrupt and a cautioner to his creditors. That offer must be entertained at one meeting, and accepted at another by majorities fixed by the statute. If that composition is accepted by the creditors, and if the arrangement is confirmed by the Court, on its being submitted to the Court, which it must be, then the bankrupt is discharged. Discharge upon composition has this important consequence, that the bankrupt is reinvested in his estates. He gets back the property that was formerly under sequestration, and is thereafter entitled to deal with it exactly as if he had been solvent, and as if there had been no sequestration at all. The bankrupt is reinvested in all his estates, and his rights connected therewith. That is the first kind of discharge—discharge upon composition, and it is most important and beneficial both for the bankrupt and the creditors; it is, in fact, a purchase of the estate from the creditors made by the bankrupt and his cautioner. The bankrupt and his cautioner must offer composition, equivalent or nearly equivalent to the supposed value of the estate, and under this arrangement the estate is conveyed to the bankrupt, and he remains liable only for payment of the composition. We shall see the important effect of the sequestration statute upon the composition arrangement in this way:—If the bankrupt fails in payment of one instalment of composition, you cannot do more than charge him for payment of the composition promised; you cannot revert to the original debt. In a common law arrangement, if the insolvent person fails to pay his composition, you can

revert to the original debt and sue him for it. That is one kind of discharge under a sequestration; and the other kind which is to be distinguished from it, is a discharge without composition. When the estate, if any, has been allowed to remain in the hands of the trustee to do what he can—to pay any dividends or exhaust it in expenses—the bankrupt simply applies to be discharged of his liabilities. He may get this discharge after his examination in the sequestration if he has the consent of all the creditors to his discharge, by applying to the Court. Then he can get it six months after sequestration with the consent of a majority of creditors in number and four-fifths in value; at twelve months with a majority in number and two-thirds in value; and in eighteen months with a simple majority in number and value. Two years after sequestration, a bankrupt is entitled to discharge without any consent, simply upon applying to the Court. The only check is, that the trustee must report on the bankrupt's conduct, and that the Court, if they think his conduct has been characterised by any fraud, or any violation of any of the provisions of the statute, such as concealment of his funds, may, though no creditor makes any opposition, refuse his discharge either absolutely or for a period fixed by themselves. The effect of this discharge, without composition, whensoever granted, is simply to discharge the bankrupt from the debts for which he was liable at the date of the sequestration. It does not in any way reinvest him in any estate which he possessed at the date of the sequestration; it simply sets him free from liability; and therein is an important difference between that and a discharge under a composition arrangement. Sequestration may also be awarded for a deceased insolvent's estate; and there are extensive but little known powers given by the statute for winding-up the estates of deceased persons who may not have been insolvent.

But that is merely a general view of the Sequestration Statute. I should like you to consider, rather more narrowly the nature and extent of the estate which falls to the trustee by the vesting clause of the Sequestration Statute. That is declared in absolute terms by the statute to be all estate whatever belonging to the bankrupt and attachable for debt, whether heritable or moveable, or real or personal. It is all estate, not only in Scotland, but anywhere within the Queen's dominions

that the authority of the British Parliament can reach to. That is the effect of Scotch sequestration. Thus, for instance, if a bankrupt should be sequestrated here, his funds in England, Ireland, or in the colonies all fall under the Scotch sequestration, and all fall to be managed by the trustee and realised by him for behoof of the creditors ranking in the sequestration. That is simply by force of British statute; and by international comity, which has provided an international law, the same respect is shown among all civilised nations for the sequestration process of any country where a bankrupt is resident. For instance, if the debtor is domiciled in Germany, sequestration there called *conkurs*, will receive effect in Scotland, England, or, indeed, in any of the civilised countries of the world. In the same way, the sequestration of a person domiciled in Scotland will be allowed in Prussia or Italy, or any other foreign country, to attach the bankrupt estate there situated, in order to secure that the effects shall come into the hands of the trustee. The foreign creditors will not be allowed to attach the foreign estate for themselves. They will be told that they must rank in the Scotch sequestration, and have their claims adjudicated upon by the Scotch trustee. That is a well-recognised rule of international law—at all events, as to moveable or personal estate. When on this subject, although it is rather going back, one may notice a curious question as to the effect of the Act of 1696. Suppose an English creditor, who knows nothing of the Act of 1696, or of Scotch law, gets a consignment of goods from Glasgow from a bankrupt in breach of the conditions of the Act 1696. What is to be done in that case? The English creditor naturally pleads, “I did not know the Scotch law of bankruptcy; I did not know of the Act 1696, cap. 5, passed by the Scotch Parliament.” It has, nevertheless, been held in our Scotch Courts, that a consignment of goods from a Scotch bankrupt to a man, say, in Liverpool, will be set aside, even against an English creditor, under the Scotch statute of 1696. Another case may be mentioned which I have met with in practice, and which I should imagine must frequently occur. Suppose a Scotch bankrupt, instead of giving a preference by sending goods to London or Liverpool, goes to London, sees his creditors, and makes an assignation in London in violation of the Act 1696. What is to be done? I should

think that is very common, yet, strange to say, there is no direct case. My opinion is, that the Act will apply in that case also, if the debtor is a domiciled Scot, and that the Act of 1696 will strike at any preference, even if granted in the city of London, to an English creditor. (See *White v. Briggs*, 5 D. 1148.)

We resume our subject by saying that the estate of a bankrupt, whether heritable or moveable, real or personal, wherever situated, is vested in the trustee for the creditors by virtue of sequestration. It has been held even that if the bankrupt after sequestration should recover by the verdict of a jury damages for slander, the damages so recovered will fall under the sequestration. It is not likely that the trustee would be allowed to sue an action for slander that the bankrupt had a right to sue; but if the bankrupt does sue, and recovers damages, that money has been held to fall to the trustee. But that is a mere curiosity. The thing that I wish you to observe carefully is this, that the estate of the bankrupt vests in the trustee exactly as the bankrupt had it, and subject to all latent trusts, or, indeed, all conditions, under which the bankrupt held it. We express it in law by saying that the trustee takes the estate *tantum et tale*, so much and of such kind, exactly as the bankrupt had it. That you will find in business to be a most important matter in the way of protecting, for instance, trust-funds held by a bankrupt. Suppose a man has been an executor or law-agent, holding funds of his clients when he is sequestrated. It would be most unjust if the trustee were to be allowed to attach these trust-funds which did not belong to the bankrupt, and to distribute the money amongst the creditors. In order to prevent that, the law rules that the trustee takes exactly as the bankrupt held. Accordingly, in a recent case—a pretty strong one on that matter—a law-agent had got a thousand pounds from two old ladies to lend on bond, and he had not been able to find security at the time; so he lodged the money on deposit-receipt in his own name in the hands of the British Linen Bank at Newton-Stewart. Thereafter his estate was sequestrated, and the trustee for the creditors said, “I do not know anything about this thousand pounds; I simply find it lying in the name of the bankrupt on this deposit-receipt, and I insist that it shall come to the creditors.” The Court, however, on a petition by the old ladies, were satisfied

that the money belonged to them, and decided that the creditors could not take advantage of this deposit any more than the bankrupt could have done. The principle they laid down is that, in dealing with matters of sequestration, the Court will, in the case of trust-funds, even where these funds are put into the bankrupt's own bank account, disentangle these funds from the bankrupt's own money, and give the trust-funds over to the proper beneficiaries (*M'Adam*, 11 M. 33). That is the first point, that the trustee takes as the bankrupt held; and the second point to be noticed is, that the trustee cannot take advantage of the bankrupt's fraud. If any funds are in the bankrupt's hands by a fraud which he has committed, the Court will not allow any trustee for his creditors to take advantage of that fraud, and to keep the funds against the rightful owner. A case (*Molleson*, 11 M., 510) occurred the other day where a bankrupt had made an assignation of part of his estate in security to an Insurance Company, and after his sequestration he got another creditor to lend him money to take up the debt; but he fraudulently concealed from this new lender that he was a sequestrated bankrupt. The bankrupt with the money from this new lender got a discharge of the first creditor's securities, and granted a new assignation to the new lender. The result, therefore, was that the securities that were dated prior to the sequestration were discharged by the original lender; and the second lender, who had lent the money, got an assignation dated after the sequestration, and, therefore, technically of no use against the trustee. That new loan, therefore, was obtained by fraud; for the bankrupt had concealed from the second lender that he was bankrupt. Nevertheless, the trustee for the creditors, in the execution of his duty, claimed the securities in preference to the new lender; but he was not allowed to take them, on the principle that he could obtain no benefit from the bankrupt's fraud. Another thing to be noticed is, that there is one kind of funds that a bankrupt may dispose of, but yet which, strange to say, do not fall under the sequestration to creditors—that is the case of a contingent right of succession. If a bankrupt has a contingent right to succeed to any estates, he may sell and assign that right for his own benefit, before the sequestration; but if it is a mere non-vested right of succession it will not fall under the sequestration, and will not come to the creditors.

This is a somewhat strange result, but that is the state of the matter (*Trappes*, 10 M. 38). Then there is another thing to be noticed,—a thing of some consequence to gentlemen who may have occasion to act as trustees,—and that is in regard to leases or other current contracts of the bankrupt. The right to the lease of a farm that may have fifteen years to run at the date of sequestration, may pass to the trustee in bankruptcy, but he is not bound to take it up, and he is not bound to enter on the farm. If he does enter upon the farm he makes himself liable personally for the rent. The same thing applies to the lease of a shop, or any current contract whatever. If the trustee takes up a contract which he is not bound to take, and carries it on even for a short time, he runs the risk of being held to have adopted it personally, and of being bound to fulfil it to the full extent, even though he has not funds. So that is a thing to be carefully attended to and weighed by a trustee when entering upon the possession of the bankrupt estate. He has to consider whether he will adopt or renounce current contracts. After the estate has been got into the hands of the trustee, the next point that remains to be attended to is the mode of ranking on that estate. Now there are two classes of creditors who have to be attended to. First of all there are the privileged or preferential creditors who are entitled to be paid 20s. in the £, even though there may be nothing for any others. Then there is a second class, the ordinary creditors who can only rank for a dividend. The more important of these privileged or preferential creditors are such as the landlord, who has hypothec for the current rent at the date of the sequestration; the Crown for taxes; the superior for feu-duties; and domestic servants for wages for the current term. It is also provided, and properly provided, by a recent statute that clerks or shopmen and other employees of that kind of the bankrupt are entitled to preference for four months' wages not exceeding the sum of £50, and workmen are also entitled to preference for two months' wages. These creditors must be paid in full before any of the ordinary creditors can get a dividend at all. In regard to the ranking of creditors we have to notice in the first place the form of the claim. The creditor must lodge with the trustee a document, properly termed an affidavit and claim, and also known in business as an oath or claim. This document must not be

lodged before taking it to a justice of the peace or other magistrate, and care must be taken that the magistrate goes through the form of making the claimant swear to the verity of the claim; because I see from a late case where it turned out that the claimant had not been asked to swear, that the Court were so indignant at this as to direct an inquiry to be made by the Lord Advocate into the practice. It seems very improper to say that the deponent has sworn when he has not done so. A false claim is now punishable criminally; and the bankrupt who knows of such a claim and fails to inform the trustee is also punishable. Well, the affidavit must be made by the creditor, but in the case of banks or other large corporations, where the creditor cannot appear himself, a provision is made by one of the sections of the statute to the effect that the manager, secretary, clerk, or cashier, or any of the principal officers of the bank, or other large corporation, shall be entitled to take the oath on behalf of the bank. It has been found in a case of the Union Bank in Glasgow, that an assistant-manager is entitled to take that oath. The affidavit is left, as I say, to the principal officers of the bank—the manager or other principal officers of the bank—and the furthest that the Court has gone is to say that an assistant-manager would be entitled to take the oath. The affidavit is a document with which you are probably familiar in business. The second point about it is that you cannot claim for interest after the date of sequestration. You can claim for the amount of the debt, and if the debt has been payable at or before the date of the sequestration, you may charge interest down to the date of sequestration; but no interest is chargeable after that date. Moreover, if the debt is payable after the date of sequestration, interest must be taken off as from the date of sequestration. That date is the date of the first deliverance, and you will find constantly in sequestration law that that date comes out as one of the utmost importance. That being attended to, the next thing is that the creditor in his oath must specify the amount of his debt for which he claims to be ranked, and produce his vouchers. If it is a merchant's account, all he can do is to produce his account. If he is claiming on a bill, he must produce his bill; and generally he must produce any vouchers he has, usual or necessary, to prove his debt.

Then, and this is the third point necessary to be attended to in framing affidavits, the creditor is bound to specify all the securities or co-obligants he has with the bankrupt for his debt. If he has none, he must say he has none. If he has securities or co-obligants along with the bankrupt, he is bound to specify who and what they are. That is an important thing to be attended to in an affidavit and claim. But in regard to creditors holding securities there is a further thing to be attended to of great consequence, and that is, if the creditor holds a security over any part of the estate of the bankrupt, such as an assignation of the bankrupt's life-policy, or any of his property, he is bound in his oath to put a value on that security, and deduct it from the amount of his debt, and he can only vote or draw dividends on the amount of the balance. That is the provision of the statute, and it is a rule which is simple enough, but is perhaps not sufficiently familiar to every person who unfortunately has to claim on a bankrupt estate. You must in every case deduct the value of any security over the estate of the bankrupt, held by the creditor who is claiming. The check upon the value of the security is this, that the trustee and the creditors are entitled to require an assignation of the security at the value which has been put upon it by the creditor. There are two provisions on that subject. In the case where the oath has been used in voting, twenty per cent. additional to the value must be paid by the creditors; but in the case where the oath has been simply used for a ranking, the creditors are entitled to get the security on the value stated in the claim. There is no time fixed within which the trustee or creditors in the case of ranking must make their option to take over the security. In a case not long ago a firm of stockbrokers claimed on a bankrupt estate, and stated that they held Caledonian Railway stock, which they valued at the then market price. The trustee did not do anything, but allowed the matter to lie by for months. Meanwhile the stock had risen in value to an immense extent. It reached two or three times the value in the claim. The trustee then came forward, and said, "I will thank you to hand over the stock at the price you have stated in the claim." The case came to the Court, and the Court decided that in a case, particularly of stock, or anything of a fluctu-

ating value, the trustee is bound to declare his intention to take it over without unreasonable delay; and they accordingly refused to enforce the assignation of the security.

We have thus dealt with the case of a creditor holding simply a security over the estate of a bankrupt; and the next case we have to deal with is that of a creditor holding a co-obligant, a person liable for the debt along with the bankrupt. Now, if it is the principal debtor who is bankrupt, and the other co-obligants are merely cautioners, although the existence of the co-obligants must be mentioned in the oath, it is not necessary to state the value of their obligation for any purpose whatever. If, on the other hand, you are claiming upon the estate of a cautioner, and there is a principal debtor against whom the bankrupt has a right of relief; or if you hold a security from a principal debtor, and you are claiming on the estate of the cautioner, then you must deduct the value of the co-obligant's share from your claim. Wherever the bankrupt has the right of relief against another co-obligant, or out of some security held by the creditor, you must deduct the value of this right of relief, but that deduction is only to be made for the purpose of voting.

These details are necessarily a little intricate; but I ask you to notice them. For the purpose of ranking and drawing the dividend, the law is most distinct—that if you have six co-obligants, you are entitled to rank upon the estate of each of them for the full amount of the debt to the effect of drawing 20s. per pound from the whole. Supposing that the dividends on the whole of these estates together amounted to 20s. in the pound, you are entitled to draw these dividends. You do not require to deduct the value of any co-obligation for the sake of ranking, but only for the purpose of voting, and then only when the co-obligant is the principal debtor against whom the bankrupt has the right of relief.

There is another point to be noticed with regard to co-obligants, and it is that in no case is there a double ranking admitted for the same debt upon any estate. For instance, if a creditor claims upon the principal debtor's estate, the cautioner cannot also rank upon that estate, for that would be a case of double ranking. The cautioner upon paying the debt will get an assignation to the creditor's ranking, and will himself draw

the dividends; or, if the creditor has not ranked, the cautioner upon paying the debt will be entitled to rank for himself. But the principle is one which ought to be kept in mind, that in no case will a double ranking for one and the same debt be allowed upon an estate. A curious case occurred that I may give you where something very like a double ranking resulted; and I merely mention it as illustrative of the complications which arise. A creditor claimed upon the estate of his principal debtor for the full amount of his debt, some £2000 or so. The cautioner for that same debt held securities, not only for his relief under the cautionry, but also for another debt owing to him by the bankrupt, independent of the cautionry altogether. Well, the cautioner also lodged a claim upon the same bankrupt estate, and he was bound, of course, in dealing with his own individual debt as in dealing with his claim generally, to deduct the securities as I have told you, for they were securities over the estate of the bankrupt. What he did was this. He set his securities against the value of his cautionary right of relief from the bankrupt, and then claimed a ranking from the trustee for the full amount of his own debt. The trustee in the sequestration pleaded that this could not be done; for it really amounted to a double ranking for the same debt. He said the creditor to whom the cautioner was bound had already ranked on the cautionary debt, and the cautioner by setting his securities against the same debt was in effect getting a second time the benefit of the debt for which one ranking had been already given. The Court, however, said, "No; the cautioner is quite entitled to do this. He holds securities for his relief generally against his cautionary obligation as well as against his own private debt, and he is entitled in his oath to exhaust his securities in meeting the bankrupt's obligation for relief, and to rank for the full amount on his own debt." The principle was still left outstanding, that there can be in no case a double ranking for the same debt. The result of the whole matter is just this, for simplicity and better recollection, that in every claim in sequestration, you must specify the securities and co-obligants; that if you hold a security over an estate which is bankrupt, you must deduct the value of that security, and you can only rank or vote for the balance. If you hold co-obligants or security from them, you are not bound to deduct the value

of their obligations, unless when the bankrupt has a right of relief against them, and then you deduct only for the sake of voting — not for ranking. You are entitled to rank on the estates of co-obligants to the extent of 20s. in the pound, but in no case can there be double ranking for the same debt.

The only other matter that needs to be noticed in regard to ranking, is that of ranking upon the estate of a company and also upon the estate of partners. If you rank upon the estate of a company as a creditor of the company, you rank simply for your full debt; if you rank upon the estate of one of the partners of that company, the matter is different. The partner is only liable subsidiarily to the company; and accordingly it is provided that the trustee in ranking a company creditor on the estate of the partner must deduct from the amount of the debt the value of the ranking on the estate of the company. The value of the ranking that may be obtained on the estate of the other partners must also be deducted from the claim for voting purposes. That is a peculiarity in regard to the ranking on companies' estates which is to be noticed. In England, the private creditors have a preference on the partners' individual estates, and no company creditor can be ranked thereon until all private debts are paid.

These are the principal matters that are to be attended to in regard to the ranking in sequestrations. There is a great deal of further nicety in regard to the rules of ranking that have been illustrated by many decisions of the Court, but I do not think that it would serve any good purpose to go into them here. These are the elementary rules that every one ought to know who is dealing with bankrupt estates, and I have endeavoured to make them as plain as I could.

I have already had to mention to you, gentlemen, in treating of the common law of insolvency and of the Acts 1696 and 1621, that the great object of the whole of the law was to secure equality and fair dealing among all creditors claiming or entitled to claim upon the bankrupt estate. We saw how, under the Act 1621, preferences to friends and relatives would be set aside; and we saw under the Act 1696, how transactions out of the ordinary course of business within sixty days of bankruptcy will be set aside. The sequestration law

pursues the same principle of enforcing equality and fair dealing among all the persons concerned in the estate. It is a natural tendency among men who have made a bad debt to think that it is honest for them to get payment in any way they possibly can. There is a feeling that one is getting no more than is his due, and with that notion many an honest man gets unexpectedly involved in a charge of fraud in bankruptcy matters. This may sometimes seem harsh, but it is absolutely necessary in fair dealing that all the creditors should be treated impartially, and that all these individual claims to special advantages should be put down with a firm hand; and the Sequestration Statute does it perhaps even too firmly in one or two cases which I will notice.

In the ranking of creditors the trustee supervises all, and he will see that the creditors get only their just due, and if a creditor has any complaint, he can appeal against the trustee's deliverance; but in regard to the bankrupt's discharge, whether on composition, or on petition by himself, there are most stringent provisions in the Sequestration Statute to which I think it right to call your attention most particularly. Any preference or collusive agreement for securing the discharge, or giving a creditor's consent to the bankrupt's discharge will lead to these consequences:—It will be declared null and void, and cannot be enforced in any Court of law. But that is not all. The creditor will be forced to forfeit the amount of his debt—not of his ranking—and that full amount of his debt is not the only forfeiture, for he will have to pay into Court for behoof of the other creditors a further sum; because it is provided that if a creditor has got any advantage even promised to him, in addition to forfeiting the amount of his debt, and paying it into Court for the benefit of the other creditors, he will be forced to pay double the value of any advantage he is promised. These are serious penalties, and are all directed to the one object of preventing unfair dealing. It often happens that a large creditor whose assent alone is sufficient to secure the carrying of a composition arrangement, will agree, if the bankrupt's friends, even unknown to the bankrupt, come to him and say, "If you consent to let this bankrupt be discharged, we will make it right for you after the compensation is over—we will give you a bonus or pay you

in full." If they do that, all these consequences will follow. An undertaking so to buy a creditor's consent, no matter how expressed in writing, cannot be sued upon in any Court of law, and the defaulting creditor will lose his debt for the benefit of the other creditors, and will be bound to pay double what was promised to him. It is not necessary that the creditor should have got the money; it is enough if it has been promised, and he will have to pay double that which he has not got. These are stringent provisions, and have been illustrated in one or two cases. It happened in a sequestration in 1859 that the creditor there was induced to assent to a composition by a friend of the bankrupt, without the bankrupt's knowledge. This friend said—"If you will consent to this composition I will pay you £500;" and he gave the creditor a writing to that effect. The composition was passed, and the bankrupt got his discharge. At the end of the day the creditor sued the friend for the amount of his obligation; but the friend pleaded that it was an illegal agreement, and he escaped from payment. The case is *Thomas v. Sandeman*, 11 M.P. p. 81. But that was not the whole matter. Another creditor in the same sequestration, by means of this action, heard of what had happened, and he brought a multiplepinding in name of the unfortunate creditor who got the preference, and concluded that this creditor who had got the preference should pay £2797, 17s. 6d., being the amount of debt due by the bankrupt to him, and also for the sum of a thousand pounds, or such other sum as might be ascertained to be double the value of the preference given or promised to Mr. Thomas for securing or facilitating the discharge of the bankrupt under the Sequestration Statute 19 & 20 Vict. cap. 79. The Court actually found that the unfortunate man had to pay these sums. He had not only to pay the amount of his debt, but double the money which he never received. You will not be surprised to hear that my Lord Deas made these remarks:—"I am compelled, not very willingly I confess, to come to the conclusion that the plea which is stated by Mr. Thomas, and which has been argued before us, cannot be sustained. What the other creditors might say to this I do not know. I can only say for myself, that if I were a creditor I should certainly not like any portion of that money to come into my pocket. It is an in-

stance, and, I am glad to say, a very rare instance, in the administration of our law, where the law will give the party a title to money in a way which is dishonest, and I should hold it to be dishonest if I were a creditor to come forward and claim any advantage from the success of the plea which is here to be sustained. But that is a matter for the creditors themselves individually to consider." Lord Ardmillan, in his usual style, remarks :—"The result here is inevitable. I could have wished it otherwise. I cannot help saying that I think Mr. Thomas more 'sinned against than sinning.' I have great sympathy with him; but I have no alternative."

These were serious conclusions to follow from what the creditor, no doubt, thought a perfectly fair obligation. There is another case in illustration of that—namely, that of *Messrs. M'Laren & Company* in the sequestration of *Pendreigh*, 9 M.P. p. 49. In that case Messrs. M'Laren were principal creditors in the sequestration of *Pendreigh*, and they did not want to go into the composition arrangement that was offered. Some smaller creditors said, "Please go into this arrangement and we will give you so much money." Messrs. M'Laren got the money, and thereafter they had been told by their agent that it was not a proper thing to do, and they returned the money, and the composition arrangement, as I understand, never went on; but in this case the Court held themselves bound to apply the same doctrine—the loss of the debt and the forfeiture of double the amount of the preference. Lord Westbury, one of the greatest lawyers that we have had for many years, says, and his remarks are worth attending to: "There are two maxims which must never be weakened in the Courts of Justice. The first is, that you must ascribe to every subject a knowledge of the law, more especially in cases where the law prescribes the rule of civil conduct. That is the case here, because the law deals with what ought to be regarded as a well-known rule of commercial obligation—namely, that where you come to have an estate distributed among all equally, one creditor shall not in any mode obtain a peculiar or predominant advantage for himself. The other rule of law that must not be weakened is this, that you must ascribe to every man a knowledge of that which is the necessary and inevitable result of an act deliberately done by him." They (M'Larens) "acted simply

from the reason that they themselves put forward, that they believed that the bankrupt estate, if worked out, would give a greater dividend than the composition that was offered, and that they accepted the sum of money, therefore, in the conviction that they received that which was their due, or somewhat less than their due, and that they did it merely because the long delay which might otherwise occur in the final distribution of the estate, might be injurious to the smaller creditors, who were less able to wait for the legitimate dividend than themselves might have been ; but it is important that these enactments which are passed to secure commercial morality and fair dealing between creditors, should not be in any respect impaired or modified or reduced in their wholesome application, by arriving at subtle distinctions, or by indulging in views for the purpose of avoiding the operation of the statute. It is our duty to apply these enactments, and although in this case we exonerate the parties from having acted from *malus animus* in the matter, still they have brought themselves within the reach of a wholesome law, and it is our duty to apply that law without any compunction or any attempt to mitigate its application."

These cases, gentlemen, I think, are well to be borne in mind by commercial men, as showing the principle upon which the law acts in setting aside all attempts at fraud, or obtaining undue preference by creditors. I have only further to notice as a sequel to that case of *Pendreigh*, that the bankrupt applied, in 1875, to get a discharge ; but he was refused a discharge altogether, because he had forfeited, as the Court held, all privileges under the Sequestration Statute, by being cognisant of the preference that was offered to M'Laren & Co. The consequence, in short, in regard to the bankrupt, where he is cognisant, or is a party in giving any advantage to procure his discharge, by composition or otherwise is, that he loses the benefit of discharge altogether. Mr. Pendreigh, in consequence of that decision, will only have recourse to the remedy of decree of *cessio*, because he can never get discharged as another debtor might under sequestration. In regard to this *cessio* there is a provision in the statute, that if an estate has not yielded more than a hundred pounds, the creditors, if they think fit, shall resolve that the bankrupt shall

only get *cessio*. That is intended for bankrupts who have not behaved themselves properly.

On the whole matter of the sequestration laws I think we may fairly observe that the system is a tolerably perfect one. I think, for my own part, and it is a suggestion I may make for mercantile men, that there is, perhaps, too great facility for getting discharged, and that the conditions which a bankrupt must fulfil in order to get a complete clearance under this Act are rather too easy. I may mention that our French neighbours are more severe than we, and there is one provision in the *Code de Commerce* which I think is worth attending to in any future legislation on the bankruptcy laws. It is provided in the *Code de Commerce* that if a bankrupt has not kept books or taken stock regularly and exactly, or if his books are so ill-kept that they do not show the true state of affairs, then and in that case, even though there has been no fraud, he will be subject to be dealt with by the police, and is subject in penalties. I think a simple provision of that kind applied to traders would be a thing of considerable use. Some other provisions in the *Code de Commerce* would startle gentlemen given to speculate on the Stock Exchange, because, by Art. 588, it appears that if any trader's personal expenses or the expenses of his household are excessive these traders will be subject to penalties in bankruptcy; and they provide if such person has spent large sums in pure gambling operations or fictitious operations on the Stock Exchange, or pure speculation in goods even, then and in that case, the bankruptcy will be deemed fraudulent, and he will be subject to penalties. These latter matters are, perhaps, somewhat extreme; but I think the provision about keeping books in the Act of 1880 was a proper thing to introduce for the amendment of the bankruptcy laws, which should always treat an insolvent as *prima facie* a defaulter until he clears himself.

The only other thing to be noticed about it is that the proceedings, I think, are rather expensive for small estates. In large estates there is no difficulty about sequestration—it is an excellent process. But in wretched little estates of £100, or £200 or £300, it seems like bringing a Naysmith hammer to crack a nut, and in the end of the day the creditors often see nothing but the law-agent's account and the trustee's fee for

remuneration. Some amendment at once to prevent the sequestration of small estates, and to improve the process of *cessio*, is needed. At present the process in these cases, that of *cessio bonorum*, is called the *miserabile remedium*—pitiful remedy for small debtors. Its object is, or was, to give to a debtor who surrenders his whole estate to his creditors a personal protection against imprisonment. It does not in any way discharge the man of his debts; it does not free him from claims, or his estate, or his property, or his earnings from attachment, but merely protects him from the prison. This remedy of *cessio bonorum* must be applied for in the Sheriff-Court, and it may be applied for by any man who has been charged for debt on which imprisonment may follow, or any man in prison, or any man against whom there is decree on which he may be imprisoned,—in any of these cases he may make this application. The creditors are called together by notice to consider the matter, and if the man is in prison, the Sheriff may liberate him on caution if he thinks fit. At their meeting, however, the creditors may object to his getting free. If, after examination, the debtor executes a disposition *omnium bonorum*, a Sheriff can grant him this protection of which I speak. In old times there was a curious thing done—referred to in one of Sir Walter Scott's novels—namely, to make the debtor in such cases wear a dyvour's habit. If the Court did not think the debtor's bankruptcy free from blame they forced him to wear some peculiar habit, some yellow dress or another, for a given period, as a badge of disgrace, and in order to show that he was not altogether clear in the matter. That old rule was only abolished in 1836. I do not mean to say that the Court was in the habit of imposing the habit down to that period, but they had the right to do so. But since the statute of 1836 was passed the Court are in the practice of giving the man *cessio* at once if they are satisfied that his insolvency is caused by innocent losses and misfortunes. If, on the other hand, he has not been free of blame, the course is to delay or refuse to grant *cessio*, and to allow him to remain in prison, or to be exposed to the diligence of his creditors.

The other matters we have to attend to are private trust-deeds and composition arrangements. These are matters depending purely upon common law, and are, therefore, purely voluntary on

the part both of the debtor and of the creditor. The debtor cannot be compelled to enter into any of them, nor can dissenting creditors be compelled to accept of any such arrangement proposed to them. It depends on consent from first to last, and is subject very often to be opposed. Now, I think you will find it too often happens that, after the creditors have had an expensive trust-deed prepared, and acted under for some time, the whole thing is upset, and the whole expenses incurred are thrown away by some one creditor, perhaps, who will not assent, and who insists upon taking separate measures; and then the estate has been thrown into sequestration, under which alone compulsory powers can be obtained in Scotland. However, if all parties are agreeable, and work together, a private arrangement by trust-deed or by composition arrangement is often a most beneficial step. A trust-deed consists of three parts. It is a conveyance by the bankrupt for behoof of all of his creditors. If trust-deeds contained that and that only, they would contain all that the law strictly allows the bankrupt to grant. The law says it is not fraud on the part of the bankrupt to grant a trust-deed for behoof of his creditors; but he is not allowed to impose any conditions by law. Nevertheless, as ordinary matter of business, conditions are imposed. And they are twofold—first to provide for the ranking of the creditors as that the trustee shall rank the creditors as in a sequestration; and, second, to provide for the discharge of the bankrupt. Now, these conditions are strictly illegal, and, accordingly, these are not binding upon the creditors. They require the consent of everybody. Suppose a trust-deed is granted; the first difficulty to which it is exposed is that the insolvent person may be made notour bankrupt within sixty days after its date by any one creditor, and then he may set it aside under the Act 1696. In short, within sixty days any creditor is entitled to say that he will not be bound by it. Secondly, in every case it will be superseded by a subsequent sequestration. No matter how old the trust-deed; if sequestration follows, the trustee in the sequestration is entitled to demand the estate by paying the trustee in the private trust-deed his expenses. Third, it may be set aside by any creditor who has used diligence prior to its date. We have been talking of one branch of the Act 1621, but there is

another branch of it which I do not think it necessary to review, relating to deeds granted in prejudice of prior diligence. Now, if any creditor has been doing diligence during insolvency, and the insolvent thereafter grants a trust-deed, that trust-deed can be set aside by the creditor under the Act 1621. If the deed is challenged by one creditor, even supposing it is five or six years old, it is exposed to those difficulties, and any one creditor can say that it is an illegal deed; and he can get over it, and attach any estate that is outlying. So, you see, from first to last, how very much it is in the power of any creditor to set aside a trust-deed, and how absolutely necessary it is to the safe working of a trust-deed that there should be acceptance by all the creditors. In regard to acceptance and consent, that is usually done by signing a document acceding. It may be done by implication; and that is one thing to be noticed in regard to it by men in business. You may be held to accede to a trust-deed, though you do not want to do so, if you attend the meetings of creditors and concur in the resolutions. The number of acts that imply accession will vary in every case; but it is right to know that creditors will be held as acceding, and barred from using separate diligence, by such acts as attending the meetings of creditors, and concurring in the resolutions of the creditors for the management of the estate by trust-deed. But even if there is accession to the trust-deed or private composition arrangement, there are two conditions creditors are entitled to keep in view. The first of these is that every creditor must concur. If I am one of fifty creditors upon an insolvent's estate, and he is proposing a composition arrangement with his creditors, or grants a trust-deed for behoof of all his creditors, stipulating for his discharge, my consent is held to be given on the implied condition that all the forty-nine agree. If one of them stand out and will not concur, my assent is not binding upon me, and cannot be pleaded against me by the bankrupt. Second, it is an implied condition of all composition arrangements that all creditors shall be dealt with equally. If any one creditor has got an advantage over the others, that will set aside the composition arrangement at the instance of any one of them.

There is just one thing I should like to call your attention to in dealing with these private arrangements with insolvents,

and it is this : In ranking on a trust-estate at common law you do not require to deduct securities from your claim. I told you that under the Sequestration Statute, by force of statute, you must deduct the value of any security you hold over the estate of the bankrupt. If the estate is merely being wound up in common law insolvency, you do not require at common law to deduct securities. Suppose I have a claim of £2000 and have securities for £200, I must deduct the value of these securities in sequestration ; but at common law I am not bound to do so. I rank for the value of my debt, and take 20s. in the pound out of the estate. When you enter into an arrangement with an insolvent person at common law, the agreement generally is such as this. " We agree upon payment of the composition at six, twelve, and eighteen months, to discharge our debt." If there is failure in payment of any one of these instalments, you will be entitled to sue for the whole amount of the debt. Creditors ought to be careful in assenting to any composition arrangement to see that nothing is done in prejudice of that right. If you grant a discharge to an insolvent person, and leave him liable only for the composition, the result would be otherwise. For instance, if you discharge a debtor who is owing you £100, and leave him debtor for the composition, you can only be a creditor for the composition ; but in the proper form the creditor merely agrees to accept the composition which is offered, and on payment of that to discharge the debtor. If the creditor takes that form his right remains absolute, and if there is failure to pay any one instalment, he has a right to the full debt.

Then there is another thing to be noticed. If an insolvent person should give any preference to any one creditor over the others in a composition arrangement, that preference will upset the whole arrangement at the instance of the other creditors. And, still further, if that preference has been given by a bill, or has been promised by the bankrupt in writing, he need not pay it unless he likes. It is not a thing that can be sued upon in any Court at common law. Still further, if an insolvent has given a bill to a favoured creditor as a preference in order to secure a composition arrangement, and if that bill pass into the hands of an onerous indorsee, the insolvent, upon payment, will be entitled to recover the amount from the

creditor to whom; by promise of preference, he has given the bill. The only other case is, that if a bankrupt voluntarily pays preference money to a creditor he cannot recover. These are the provisions to prevent any preferences by an insolvent person, and against unfair dealing. So you see the difference between common law and the Sequestration Statute. Common law sets aside the preference, but the Sequestration Statute imposes severe penalties on the person preferred, as well as on the bankrupt who has given the preference in order to carry the composition. The Debtors' Act of 1880, 43 & 44 Vict. c. 34, besides abolishing the imprisonment of debtors, except for aliment and taxes, provides, as we have seen, a penalty for a bankrupt with debts to the amount of £200, who has not kept the usual books for three years before his bankruptcy, unless he proves that he had no intent to defraud. The same statute also renders punishable such acts by a bankrupt as the non-disclosure of his affairs, concealment of his goods, the falsification of his books, and the pawning of goods obtained on credit. It also alters and amends the statutory provisions as to *cessio* contained in 6 & 7 Will. IV. c. 56, and 39 & 40 Vict. c. 76. Any debtor who is notour bankrupt may now apply for *cessio*, and the creditor of any notour bankrupt may have him compelled to cede his estate to his creditors. The new statute omits to provide for the decree of *cessio* operating as a discharge to small debtors on a surrender of their means as in sequestration.

LECTURE III.

GENTLEMEN,—The subject with which we have to deal to-night is that of "Cautionary Obligations." The elementary idea of the subject simply is—the accessory obligation of a man who has in view an obligation already incurred by the principal debtor to a creditor. There must be a principal debtor who has incurred an obligation to a creditor, and the cautioner or surety comes between them and says,—“I promise that the debtor shall do, pay, or perform the obligation he has undertaken, and if he fails I shall make his obligation good.” Now I ask you to attend to the nature of cautionry in that respect, because many important consequences follow from it in law. The cautioner you see intervenes between the principal debtor and the creditor, and our law of cautionry being mostly derived from the Roman law, we have one or two names of considerable importance in various fields of thought which are derived from the law of Rome. For instance, the cautioner was called in the Roman law the sponsor for the debtor. The same idea is continued in common thought when you speak of one man being sponsor for a certain thing. Under the Roman law that is one term which is applied to the cautioner who accepts the obligation that lies upon another. Another Roman law name for cautioner was that of intercessor, and the cautionry was called *intercessio*—intercession—the act of intervention, or intercession of a cautioner to the creditor for behoof of the principal debtor. Now these terms are familiar in common speech in regard to cautionry, and the whole doctrine of cautionry is an example of what seems to me to be very accurate thinking in regard to the consequences of one person becoming bound for another to the principal creditor, not with the view of relieving the debtor, but with the view of paying simply if the principal debtor fails. You will find in the sequel that it is of some consequence

to attend to the character or nature of cautionry. It is a purely accessory undertaking on the part of the cautioner. It implies always the existence of a principal debt, which is undertaken for and with the principal obligant. There are many cases, as you know, in business where a man may undertake the debt of another, but with the purpose of relieving him entirely of payment. For instance, if a firm has incurred obligations, and is dissolved, and another firm comes into possession of their premises, of their assets, the new firm may take over the obligations of the old firm, and being liable for them, and being accepted by the creditor as liable, may relieve the old firm entirely. That is a case of what is called in law "novation"—the acceptance of a new debtor instead of an old debtor. A cautioner is to be distinguished entirely from that. There is in suretyship the acceptance only of an additional debtor by the creditor for and with the principal debtor. The new obligant is not accepted in lieu of the debtor entirely, but for and with him, and, upon his failure, to pay the debt. Then other consequences follow the intervention, or intercession as the Roman law has it, of a cautioner between a creditor and a principal debtor. He is regarded as doing a friendly act on behalf of the debtor, and accordingly any obligation he makes is construed strictly. Cautionary obligations are to be construed strictly, and to no more than they exactly import according to the words used. The utmost fairness is required on the part of the creditor in inducing the cautioner to become bound for the principal debtor, in so much that any misrepresentation on the creditor's part, in order to induce the cautioner to come in, will annul the cautionary bond altogether. Then, when a creditor has got a cautionary obligation, he is bound to act fairly towards the cautioner. For instance, there should be no negligence, no remissness in regard to the principal debtor, to do all he can to get payment from the principal debtor, because the cautioner by the nature of his obligation is only liable on failure of the principal debtor to pay. And in connection with this matter we have in our law books many cases in which cautioners have been relieved, or have presented to the Court strict pleas with regard to their liabilities, contending that they only became bound for a friend to the creditor, and that they were making nothing by the obligation, and that

their obligation was to be enforced against them according to its literal words. In all cases the Court has invariably held that the obligation of a cautioner should be no further enforced than the exact words will carry. But there are various consequences that have been deduced, logically deduced from the very idea of cautionry. The principle of cautionry is simply this: There are a creditor and principal debtor, and there is a cautioner who intervenes between the two and says,—“I will pay the debt, or perform if the principal debtor fails to perform.” I ask you to notice that the cautioner is not necessarily bound for payment of debt in money. He may be bound for the performance of an act—for the delivery of goods—for the performance of the duties of an office—or for anything, in short, that may be laid on the principal debtor, and in respect of these the cautioner may intervene and intercede.

The first thing to be noticed, and the first deduction from the principal idea of cautionry is that there must be a principal debt independent of the cautionry. A cautionary obligation is not an independent obligation—it is merely an accessory for the purpose of securing the fulfilment of a principal debt or obligation already constituted between the debtor and his creditor. Now that is the first point that is to be noticed in the system of cautionary obligation, namely, that there must be a principal debt. That is not such a truism as it may appear to you at first sight, because that principle gives to the cautioner the right to make any objections to the debt or obligation of the creditor which the principal debtor himself can do. If I am cautioner for anybody I am entitled, upon being asked by the creditor to pay, to propound any objection the debtor himself could have made to the payment of the debt. There must, in short, be a debt that was exigible against the principal debtor. The only exception to that is this, that there may be cases where the principal debtor is bound, not legally but morally bound, to pay, and the cautioner nevertheless shall be bound, although the principal debtor cannot be forced by the action of law. Those cases arise where persons incompetent to contract obligations have contracted obligations. For instance, if a married woman contracts a personal obligation, her obligation is, as a rule, null; but it may be fortified perfectly well against the cautioner who may be bound by the obligation, although the

principal debtor may not be so. The same thing applies to a minor having a guardian or a father. If he contracts an obligation which is not good against himself, the cautioner may nevertheless be forced to pay. That has occurred, for instance, in relation to cautioners for minors who are apprentices. You know that in the form of indenture a minor enters into, the cautioner is held liable for the performance of the indenture. The case of *Stevenson v. Adair*, 10 M'Pherson, 919, decided that the cautioner was bound by the minor entering into an obligation without the consent of his father, although it is doubtful whether the obligation is binding on the minor.

Then the second point is, that the cautioner is bound for the principal debt, but in no case can he be bound for more than the principal debtor—the cautioner can never be bound for more than the principal debtor owes. For instance, if the principal debtor owes only a thousand pounds, the cautioner cannot be bound for two thousand pounds. The cautionary obligation is invalid beyond the amount of the principal debt. Nay, the matter goes further. If the principal debt is due say on 1st January, the cautionary obligation cannot be made exigible on the 1st December. That cannot be, as the Roman law says that the cautioner cannot be put in a worse position than the principal debtor, either as regards the quantity of the debt, the time of payment, or the place of payment, and he cannot be bound for more than the principal debtor. That state of circumstances received a curious illustration, in 1875, in the case of *Jackson v. M'Iver*, 6th July, 2 Rettie, p. 882. The party there had got a loan of £300, and the creditor got from the debtor a promissory note signed by him, and indorsed by four persons known to be cautioners. The note was blank, not being filled up in any way at all, or for any sum, and this blank note was handed to the creditor, who thereupon filled it up for two thousand pounds. Upon the bankruptcy of the principal debtor, and also of one of the indorsers or cautioners, he attempted to rank for two thousand pounds upon the sequestrated estates. He urged—"I only want to draw a dividend equal to the debt that I have advanced, namely, the original debt of £300 for which I became creditor." The Court there said—"You cannot do that. Your debt was only for £300, and these persons who are

indorsers on the promissory note were only cautioners themselves, and could only be cautioners for the amount of the original debt of £300, and though you chose to fill up the note for £2000 we shall restrict the amount to the £300 for which you are creditor, and for which they as cautioners are liable." The Court accordingly held that, although the promissory note was for £2000, he could not rank upon the estates of anyone of the cautioners for more than £300. That is a simple application of the principle that a cautioner cannot be bound for more than the principal debt. The principal debt in the case I have mentioned was £300, and the cautioner was nominally taken bound for £2000; but the Court held that was illegal, and that the cautioner could not be bound for more than the principal debtor, and that the creditor could only rank for the original £300, and not for the £2000.

Now, although the cautioner cannot be bound for more than the principal debt, he may be bound for less. If a man is owing £1000, he may give his creditor caution for £500, and that would be perfectly legal; but if he is owing £1000, he cannot give caution for £2000. The cautioner, in that case, even though bound by the most solemn instrument, would not be bound for more than the principal debt—namely, for the original £1000.

The third point to be noticed is that the cautioner is only bound for the principal debt according to its terms, and not for any other. If the principal debtor is liable to the creditor say for a thousand pounds, payable on 1st January, the creditor is not entitled to alter the contract, and make the date at which the sum is payable the 15th May, without the cautioner's consent. If he alters the term of payment in any way, or if he alters the nature of the contract between him and the principal debtor, he need not expect to hold the cautioner liable. The cautioner is liable for no more than the principal debt as at the time when he entered into it, and any subsequent alteration upon the terms of the debt, such as even the altering of the date of payment from 1st January to 15th May, would discharge the cautioner. In such a case the cautioner would be entitled to say, "This is a new debt; it is not the one for which I became bound, and I claim not to be liable at all." The same thing would occur if the nature of

the cautioned office was changed. If I am a cautioner, as has occurred, for a man appointed by a certain parochial board to a certain office, and if that board combine with another parochial board, and the new joint-board appoint the same man to the same office, say their collector or public officer, I am entitled to say, "You have changed the nature of the office, and the nature of the obligation which I undertook, so that I am no longer cautioner." That has occurred in England in a case where the nature and duties of the office were the same, the appointment being held simply by the same individual but from different parties. In short, a cautioner is bound for no more than the principal debt; and any alteration of the terms of that debt by the creditor between himself and the principal debtor, will make it a new debt as to the cautionry, and the cautioner will be entitled to say, "That is not the debt for which I became cautioner, and I am not liable for it at all."

Then the fourth point to be noticed is that whenever the principal debt is in any way discharged, the cautioner is at once discharged. That follows of course from the very nature of cautionry. The cautioner promises to pay the principal debt only upon the failure to pay of the principal debtor. If the principal debt by compensation, or "confusion," or by any way known to the law, is discharged, the cautioner is at once entitled to say to the creditor, "That debt is paid—it is liquidated, and I am no longer liable to you."

Then the fifth point to be noticed is, that by common law, until altered by statute, the cautioner was entitled to say to the creditor, "You cannot come upon me until you have discussed the principal debtor." The cautioner had by the common law what is called the benefit of discussion. That benefit of discussion entitled the cautioner to require that the creditor should not only have sued the principal debtor, but that he should have got a decree against him and charged him on that extracted decree, and should have even gone the length of putting him in prison, or pouding his moveable or adjudging his heritable estate before he could come upon the cautioner; for the cautioner was only liable on the failure of the principal debtor. Under the Mercantile Law Amendment Act, 1856, it is provided: "Where any person shall, after the passing of

this Act, become bound as cautioner for any principal debtor, it shall not be necessary for the creditor to whom such cautionary obligation shall be granted, before calling on the cautioner for payment of the debt to which such cautionary obligation refers, to discuss or do diligence against the principal debtor as now required by law; but it shall be competent to such creditor to proceed against the principal debtor, and the said cautioner or either of them, and to use all action or diligence against both or either of them which is competent according to the law of Scotland." So that the creditor can proceed at once against either the principal debtor or cautioner; but still the common law nature of the cautionry remains, that the cautioner is only liable on the failure of the principal debtor, and the creditor will be held bound to use all due and proper precautions for securing the debt from the principal debtor, or his estate. For instance, if a creditor holds securities from the principal debtor, he will be bound to make good use of them towards relieving the cautioner, and he will not be allowed to sue the cautioner if he has lost or thrown away the securities that he held from the principal debtor.

The sixth point to be noticed in regard to cautionry is, that the cautioner has, by the nature of his obligation, always good right of relief against the principal debtor. He is intervening—interceding, in the words of the Roman law, between the principal debtor and the creditor for a debt that is none of his; and accordingly, when he pays that, he is entitled to come upon the principal debtor, and say, "You must reimburse me for this money that I have advanced on your account." Nay, further, the law gives him this advantage. If he has entered into a cautionry, and the principal debtor becomes insolvent, or is, in the eye of the law, *vergens ad inopiam*—that is to say, is in a state in which he is not likely to be able to meet his obligations—the cautioner is entitled, without paying, to proceed against the principal debtor and require that he shall provide for the cautioner's relief against payment of the debt. Further, when the cautioner, without payment, is sued by the creditor, he is entitled to go at once against the principal debtor, and plead, "The creditor is asking payment from me; will you be kind

enough to give me money to pay him at once, for I am distressed." That technical "distress" of the cautioner gives him right to instant relief as much as where he has actually paid the debt. In that case he is absolutely entitled to obtain relief from the principal debtor—he is entitled to go to the principal debtor and say, "I have paid this money on your account; you will have to pay that to me."

The seventh thing, then, to be noticed, is the equitable right of the cautioner as against the creditor. He is entitled to say to the creditor, "I shall have an assignation of this debt if I pay it to you, in order that I may make it effectual against the principal debtor; I shall also have an assignation of any securities you hold from the principal debtor." He is entitled to what is called technically, *jus cedendarum actionum*—a right to demand an assignation from the creditor when he pays the debt to him. That assignation is in order to enable him more effectually to operate his relief from the principal debtor. He is entitled to say to the principal creditor, "If you wish me to pay this debt, I will pay it, but you will have to assign me to your full position against the principal debtor, and you will have to assign me into your full position in the securities the principal debtor has granted for the debt." If there are more than one cautioner, or if there are several co-cautioners, the one who pays alone gets an assignation to the whole rights of the creditor.

Then, in the eighth place, we have to notice that each co-cautioner is liable to the creditor for the whole debt. The creditor may go against each co-cautioner for the whole debt, or may rank on his estate in insolvency for the whole debt, so as to get 20s. in the pound; but, as between themselves, each is liable only for his share; so that if I am one of three co-cautioners, and if the creditor has got me to pay the whole debt of 20s. in the pound, I have the right to go against the other two co-cautioners, and require them to contribute to me a third each. There is what is called relief between co-cautioners. So you see there are several things to be noticed. The cautioner has always relief against the principal debtor. He can always demand that he shall get entire relief. As regards the creditor, he is entitled to insist that the creditor shall do all he can to get the debt from the principal debtor,

and that the creditor shall give an assignation of any securities for the debt itself which he holds from the principal debtor, if that be necessary, to enforce the cautioner's relief. And then it is necessary to observe that, when there are more than one cautioner, each co-cautioner has the right of relief against the others for their shares. Of course they all have the right of entire relief against the debtor between themselves. But if one pays, he can exact from the other co-cautioners a rateable contribution to the debt.

These are general remarks in regard to the elementary ideas about cautionry; and I want you to keep in mind that the essence and very idea of cautionry, on all occasions, is that of a person becoming bound for the debt of another, not so as to relieve that other, but if that other person shall fail to pay. It is a merely accessory obligation, not an independent obligation that exists by itself. It requires and depends upon the existence of a principal debt; and I wish you to notice, that an obligation which is of the nature and essence of a cautionry may be contracted in any form you please. It is not in the least necessary that the party who is really the cautioner should be called the cautioner in the obligation he undertakes. It is quite enough in law if in reality he is merely cautioner—merely intervening for the debt of another, and undertaking to provide in the event of the other failing. You must not expect, in all cases of cautionry that you will meet with in business, to find a cautioner deliberately undertaking, "I become cautioner for the debt of A. B.; I become liable to pay his debt if he fails." That is not the way he will agree to the thing. But you will find the creditor and principal debtor, and you will find another man intervening in any possible way whatever on behalf of the principal debtor, and becoming liable in what is called a cautionary obligation. Accordingly, a great deal of confusion and difficulty about the law of cautionary obligation arises simply from people forgetting that wherever you have the essence of this obligation—namely, an accessory obligation for another man's debt—you have a cautionary obligation, and it is not necessary, that the man should be called cautioner in so many words. In the Roman law, which is the classical law on this subject, there is for the benefit of those called cautioners a provision

called "benefit of division." That applies to a case which rarely happens in business, where you have a creditor and principal debtor, and two or three parties interfering expressly as cautioners—binding themselves as cautioners in that name and no further. Well, if they use that name and nothing else, then, no doubt, they are entitled to the Roman law privilege of division, which means that one of these parties, upon being sued for the debt, all his co-cautioners being solvent, is entitled to say, "I am only liable for a share; you can go against the other parties for their shares." The unfortunate thing is, that that rarely occurs in business. Nobody is ever bound simply and expressly as cautioner. In business, as you will meet with it, parties are generally bound as "cautioners, sureties, and full obligants" with the debtor, as in a cash-credit, or bound "jointly and severally" with the original debtor. In these cases where a party is jointly and severally bound there is no benefit of division. The creditor is entitled to take 20s. in the pound from any one of the parties, leaving him to seek his relief against the other cautioners for their shares. In all other respects these parties are really cautioners. I only say that to warn you that you must not expect in business to find people binding themselves expressly and technically as cautioners. The law looks to the essence and real nature of the thing, as I have given it before;—A. B. becomes bound for C. D. to pay his debt or perform his obligation. It is merely an accessory or independent obligation which implies the existence of a principal debt, and implies simply an obligation on the cautioner to pay on the failure of the principal debtor to pay. That is essentially the idea of cautionry; and whenever you have got these elements of one man becoming bound for another's debt, not as relieving him of his obligation, but simply becoming bound with him upon his failure—whenever you have these essential ideas, no matter how constituted, by bill or in any way you please, then you have a cautionary obligation, with the equitable and large results following.

Now my intention is to mention, as I have hitherto done, first the general nature and general rules, of all cautionries, and then give you one or two separate kinds of cautionries, such as cash credits, and bonds for offices. The first general rule to

be noticed in regard to all cautioneries whatever and howsoever constituted is that they must be in writing. That was fixed by the 6th clause in the Mercantile Law Amendment Act. No cautionary obligation, no guarantee or security for the debt of another is valid unless it be in writing. Before 1856, there were a few cases in which a man might become cautioner or guarantee for another by mere word of mouth. Since 1856, it is settled that there must be writing of some sort. Now the writing may be of any kind you please. It may be a formal bond of caution, or a bond in security, and the words usually are, "I bind myself as cautioner, security, and full obligant, for and with the said A. B., principal debtor." These are the usual words of the bond. It may be a bond of cash credit in which one of the parties is authorised to draw on an account, and the other parties are bound jointly and severally along with him. *Ex facie* of the bond, they are all principal debtors, but only one party is authorised to draw on the account, and the other parties are really cautioners, and have all the equities of cautioners as against the bank. Then you may have it in the form of a bond for the performance of an office. When a bank agent, for instance, is sent down to the country, a bond of caution is drawn for the performance of his office to the bank, and that will usually be done by a formal deed, regularly attested and signed; but all the law requires is that it must be in writing. Suppose, however, it is a cautionary guarantee granted by one merchant to another, for instance, for goods—a guarantee *in re mercatoria*—in such a case the deed does not need to be attested, it is enough if it is signed or even initialed by the party in his ordinary manner of signing any other business letter, memorandum, or document. That will be sufficient to bind in a case *in re mercatoria*. There may be cases where a formal bond is granted or is required, but which has been imperfectly executed. For instance, there was a case where an English Insurance Company got a bond of caution executed in Scotland in the English form by cautioners for a Scotch debtor. That bond was not worth twopence in Scotland, because it was executed according to the English forms and not according to Scotch forms, as the law stood before the Conveyancing Act of 1874. Nevertheless it was held binding on the cautioners and the principal debtor

in Scotland, because the English creditors had really advanced money upon it. There was in law *rei interventus*, because the money had been advanced on the faith of an informal writing. So that already we have three cases—the case of a regular, formal bond—a document *in re mercatoria*, granted by one merchant to another, or granted by one merchant to the bank for over-drafts, and that does not need to be attested by witnesses, or have a testing clause, a mere letter to the bank will do—and third, the case where even a formal bond was required, but it was not properly executed, yet, nevertheless, if the creditor has acted upon the faith of the bond, and if there has been *rei interventus*, it will be binding by reason of his having trusted to the security of the bond.

Now a cautionary must always be in writing—you can never rely upon any parole statement. If a man were to say to you, “Advance money to A. B., and I will see you paid,”—if that is done by word of mouth, the obligation is worth nothing. That is a mere parole obligation and will do you no good. If you want to make him security, guarantee, or cautioner, you must have his obligation in writing—merely word of mouth will not do.

The next general rule to be observed is, that perfect fairness is required on the part of the creditor, before the cautioner can be validly bound by any cautionary obligation. Suppose I am a creditor of A. B., and I begin to doubt of his ability to pay his account with me in my bank, or his account with me as a merchant. I say to him, “You must find me caution, or I will close the account.” He produces a cautioner to me. Now I am entitled to take that cautioner, and I am not bound to say anything to the cautioner as to the reasons that induced me to require him; but if I say anything at all, I must say the whole truth. I am not bound to tell the cautioner my reasons for requiring a cautioner; but if I say anything to misrepresent or conceal materially the nature of the risk the bond is bad. I must not say or allege one thing, and keep back others, so as to lead the cautioner to take an essentially false view of the case. On this point we have the case of the *Royal Bank v. Ranken*, July 20, 6 Dunlop, p. 1418. In that case the Royal Bank had already advanced £20,000 upon the security of certain heritable subjects. The Bank was about to advance £22,000 more, and they agreed to

take a heritable bond for the whole £42,000 all at once. They wanted, however, to get a cautioner for the interest on the £22,000 which they were advancing, and they wrote a letter addressed to a lady who was likely to be cautioner for the debtor, to the effect : " We are going to give an advance of £22,000 over specified lands, belonging to Allan & Sons ; and will you be kind enough to agree to become cautioner for the interest as upon £22,000." But it turned out, as I have said, that at the date when they were demanding a cautionry from the lady, the real burden that the Bank had, and which they were laying on the property by a heritable bond, was not £22,000, but £42,000. Subsequently the Bank made a claim on the lady, who believed she was cautioner only for the interest on £22,000, and she resisted, saying, " You led me to believe that the whole advance was £22,000, whereas you were taking a bond for £42,000, having previously made an advance of £20,000. You were not bound to tell me anything, but you told me not all the truth, and therefore the cautionry is null." Lord Jeffrey's remarks are of consequence, and are to be borne in mind by men of business. He says : " It is no doubt quite true that a creditor who requires a cautioner along with his principal debtor, or to whom such a security is offered, was in no way bound to make any representation to such proposed cautioner, or to give him any warning or information as to the extent of the risk he is undertaking ; but then, if he does make any such representation, he must take care that it is a full and fair one ; and if he either conceals any facts which obviously are material, affecting the risk, and still more if he in any way so misrepresents those facts, whether intentionally or from mere blunder and carelessness, as necessarily to mislead the cautioner as to the hazards of his undertaking, then certainly the cautioner must be liberated, and can never be held to an obligation substantially different from that held out to him." In this case the cautioner pleaded, " Well you, the Royal Bank, led me to believe that all the advance you were taking against this property was the advance of £22,000. You said that by your letter to me, and you never told me that you were taking security as for an advance of £42,000 altogether. I counted upon the property being sufficient by its rents to meet a heritable

security of £22,000, and if I had known the heritable bond was for £42,000, I would not have become cautioner." The Court held, although there was no fraud or wilful intention on the part of the Royal Bank to deceive the cautioner, yet they had failed in their duty to make a full and fair statement, and decided against them. So the rule is, when requiring a cautioner, to explain your whole reasons or none at all. It will not do to assign one plausible reason; you must explain fairly the reasons why you are asking a cautioner to come in, if you make any explanation. The like occurred in another case—*The British Guarantee Association v. The Western Bank*, 8th July, 1853, 15 Dunlop, p. 834. There a teller of the Western Bank was required to find caution, and he produced the British Guarantee Association. This Association before becoming cautioners put in a schedule of inquiries, asking particulars, as for instance, how often the employer would balance the applicant's accounts, and what were the checks to secure accuracy in his accounts. The answer was that the cash was checked weekly by a brother teller, and by the manager separately, and monthly by the directors. Well, it turned out that his check was not weekly by his brother teller, or monthly by the directors; but that in fact they just checked when they thought fit. There was a sort of form of checking now and then, but no reality. There was not the check that was mentioned in the proposal. The Association became cautioner for the teller, who absconded, leaving a deficiency of more than £2000. The Western Bank tried to recover this money, but the Guarantee Association pleaded: "You told us that you checked your cash weekly by a brother teller, and that you checked it monthly by the directors. We have found that that was not the course of management. You misled us; you did not inform us truly of the risk, and we are not bound." The Court held that the representation as to the mode of checking was material to the risk, and amounted to an undertaking by the Bank which had not been complied with, and, therefore, the cautioners were free. In the case of *Falconer v. The North of Scotland Bank*, 20th March, 1863, 1 M. 704, a certain customer of theirs had incurred a debt of about £7000, and they were going to take a composition for that debt of £2000. They said, "We will

take that £2000, and let you off; but you must get us a cautioner for the £2000." The customer went and got a cautioner, and he subscribed the bond that the Bank wanted. The bond was prepared as if it were for the advance of £2000 by the Bank to the customer. The Bank in no way revealed to the cautioner that this was really a composition bond in lieu of £7000. Of course, the customer could not pay, and the Bank tried to enforce their obligation against the cautioner. The cautioner then urged :—" You did not tell me the whole of the facts. You, the Bank, pretended that it was a mere obligation for a new advance for £2000 which my cousin was getting. I did not know anything about it : I thought he was carrying on his business quite well, and that this was a mere extension of his credit. You did not deal fairly by me ; " and the Court supported his contention, and said, if the Bank wanted a cautioner for an insolvent customer's debt, they should have told the whole circumstances, and not have represented it as an ordinary loan.

The general result of these cases is that you may not be bound when requiring a cautioner to explain the whole circumstances to the cautioner. You are entitled to say to the debtor that you want him to find a cautioner, and you are entitled to take the cautioner, and leave him to inquire for himself as to the risk ; but if you make representations to him at all, directly or indirectly, you must explain the exact position in which the debtor stands to you, and your whole reasons for requiring caution. If you do not do that, the danger is the cautioner is entitled to say he has not been fairly dealt with, and that he had been required to go into the cautionry under a false view of the circumstances.

I am dealing at present with rules applicable to all cautionries in any form you like, by bills or by bonds, or anything you please. Another of these rules is now to be noticed under the Mercantile Amendment Act. Suppose you get caution for a firm, and a change takes place in that firm, if there is a new partner introduced, or a partner retires, then section 7 of the Mercantile Law Amendment Act applies. It is in these terms :—" No guarantee, security, cautionary obligation, representation, or assurance, granted or made after the passing of this Act to or for a company or firm consisting

of two or more persons, or *to* or *for* a single person trading under the name of a firm, shall be binding on the granter or maker of the same in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the partners of the company or firm *to* which the same has been granted or made, or of the company or firm *for* which the same has been granted or made, unless *the intention of the parties*, that such guarantee, security, cautionary obligation, representation, or assurance shall continue to be binding, notwithstanding such change, shall appear, either by *express stipulation* or by *necessary implication*, from the nature of the firm or otherwise." The effect would be that if new shareholders came into a joint-stock bank, where from its constitution there is constant change of partners, a cautionary guarantee held by the bank would not fall; but in the case of a private firm, say John Smith & Son, you must take very great care under this statute for the subsistence of any guarantee given for such a firm. If John Smith introduces his son and gives him a sixteenth share, that introduction, even although the son seems to be nobody, may render your guarantee for the old firm quite useless. This is a thing that business men are apt to forget in dealing with firms which are hereditary, where sons are introduced generation after generation. In such a case business men seem to imagine that it is always the same corporation. But you must be careful, if a son or anybody else is introduced into a firm, to keep up your guarantee, because such a change in the firm may, according to the Mercantile Law Amendment Act, destroy your guarantee. That is a thing to be specially remarked in relation to all cash credits or other advances to firms for which caution has been taken.

Another general rule or principle is, that if you have more than one cautioner indebted to you—I am considering the case of a bank with more than one obligant for its advances—you must be careful how you discharge one of the cautioners. The terms of the Mercantile Law Amendment Act, section 9, are:—"From and after the passing of this Act, where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor, in such debt or obligation, to any one of such cautioners, without the consent of the other

cautioners, shall be deemed and taken to be a discharge granted to all the cautioners; but nothing herein contained shall be deemed to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may become bankrupt." You see that is a thing to be kept in mind. Supposing the bank has a cash-credit with three or four cautioners in it, if you discharge one of the cautioners under that clause, the other co-cautioners have the plea that you have discharged one of the co-cautioners, and that, therefore, they are not liable.

The first thing to be noticed about that section is that it does not apply in any case of sequestration. If the principal debtor or a co-cautioner has become bankrupt, and his estates have been sequestered under the Bankruptcy Acts, it is provided by section 56 of the Sequestration Act, that the creditor consenting to any discharge of a bankrupt obligant shall not thereby lose his recourse on the other obligants. Now you will remember, in some of our previous lectures, we considered the difference between insolvency and bankruptcy or sequestration. Well, if it is a case of insolvency, and the bank, the holder of the cautionary obligation, consents to the discharge of one of the cautioners who is insolvent, the bank or other creditor is very apt to lose its or his right against the other cautioners altogether. The practical rule which I wish to bring before your notice, whenever you have a case of trust-deed, may be briefly stated. Suppose one of your cautioners has granted a trust-deed. He is insolvent, and if he proposes a composition arrangement, which you are willing to take, do not do it till you have given notice to the bankrupt and the other co-cautioners. Give notice to them that the proposal has been made, that it appears reasonable, and that unless they at once come forward and take over the debt by full payment, you will accept it. Give them notice before you accept the composition and opportunity to act for themselves; otherwise you will run great risk at common law, and under the Mercantile Law Amendment Act, to have the other cautioners say that you have consented to the discharge of their co-cautioner under a composition arrangement, and they are free altogether. It is important to keep in mind that the distinction between sequestration and a trust-deed is that under sequestration you are quite safe, because you are protected by clause 56; but

in the case of mere insolvency, if you consent to the discharge of one of the co-cautioners under a composition arrangement, you run the risk of freeing all the other co-cautioners; and the only way to escape is to give them notice before you do it. A further practical rule is, in accepting the composition reserve your recourse against all other parties liable. It would be proper for the bank or other creditor that they, in accepting a composition, should minute that their rights against the co-cautioners are reserved.

The only other thing to be noticed is, when you have co-cautioners bound for parts of the debt. Suppose the principal debt is £500, and you have a cautioner for £200, and another for £300, it has been held in the case of *Morgan v. Small*, 10 M'Pherson, 610, that your consenting to the discharge of the cautioner for £200 will not relieve or affect the cautioner for the £300. It has been ruled by the Court that the only case in which the discharge of one cautioner will relieve the others is where all the co-cautioners are bound jointly and severally for the whole debt. If they are bound only for parts of the debt, you may deal with each of them separately. I may notice that it has been held in *Church of England Life Co.*, 19 Dunlop, 1079, that if you sue, for instance, three co-cautioners, as being jointly and severally liable to you, and if, after the action is brought, one of them pays his share of the debt, you are entitled to discharge him of his share, and reserve your rights as to the other two, and may still go against the other two. I think that is a safe enough precedent where you have all parties called in an action, but I would not advise you to do that where there is no action. For instance, in dealing with three solvent parties, I would not advise you to make a settlement with any one of the cautioners, and discharge him from the debt, without having the other two co-cautioners somehow or other in the field. Bring them into the field by a common action or by notice, but be very careful you do not deal with one of them separately, because you must always remember the terms of that clause of the Mercantile Law Amendment Act. When you have three cautioners, and one of them comes forward and says, "There is my share, let me off; I do not want any more to do with it," I think you would be quite safe in discharging him after notice to the others

where all are solvent, reserving always your recourse on the others. The safe practical business rule in all cases is, never to deal with one cautioner separately, but to give notice to the whole of them before discharging one who offers his share. As to the importance of expressly reserving all claims against other co-obligants, see *Muir*, 2 L.R., Sc. App. 456. You must remember that we are dealing with purely general matters relating to cautionry, and that applies to cash-credit bonds as well as anything else. Although in cash-credit bonds co-obligants are not mentioned as cautioners, nevertheless they are cautioners, and have all legal rights as such.

These are all the general remarks which I have to make in regard to cautionry. We shall now take up cash-credit bonds specially. There are just one or two things I want to mention about them. First, in those cash-credit bonds you usually have a principal debtor in the bond, who is bound, along with the others, jointly and severally. The other obligants are marked out as cautioners by the fact that only one person in the bond is entitled to draw on the credit. Parties bind themselves for a certain sum—say, £400 and interest. Now there is a peculiarity about ranking under these cash-credit bonds. Bankers have the privilege and are in the habit in their accounts to accumulate interest year by year. If I have overdrawn my account, you put the interest to my debit, and add it to the principal, and then open an account for next year in which you state the whole balance against me, principal and interest together. Where, for instance, you have several co-cautioners for say £400, and if you let the advances go on accumulating interest, and at the end of the account the accumulation of principal and interest amounts to £800, of which say only £200 is principal and the rest interest and compound interest, you might imagine that under the terms of the bond, which is an obligation for £400 and interest, you could exact from the cautioner the whole £200 of principal, and the £600 as the interest accumulated and added to the account; but the law says this cannot be done. The rule laid down by the Court is, that if the bank choose to make up accounts year by year, adding the interest to principal at the end of each year, that interest is to be treated as principal, and if, when the bank comes to claim upon the cautioner,

there is £800 at the debit of the account, it can only claim for the £400, and interest from the last balance of the account. The case that decides this is *Reddie v. Williamson*, 1 M'Pherson, 228. In this case the first thing that occurred was that the cautioners were bound for £400 with interest. At the close of the account the principal debtor's account was found to show £828, 5s. 3d. at his debit, and that account consisted not only of principal but of yearly accumulations of interest which had been added to the account, and the person representing the bank there wanted to say: "We will go back to the beginning of things and distinguish what was principal and what was interest, and we shall thank you to pay us the £400 of principal advanced many years ago, and all the interest and compound interest that have since been accumulating." The doctrine, as explained by the present Lord President, is as follows:—"Whenever a sum has been drawn under such a credit bond, and entered into the account, it bears interest from the date of the advance; and if the sum drawn out is within the limits of the credit, the co-obligants are all liable for that sum and interest. But according to the invariable practice of bankers that interest is not allowed to run on beyond the end of the year in which the advance is made. The co-obligants under the bond are all then bound to pay up that interest, although the principal be not payable, unless the bank resolve to put an end to the cash-credit. But if the bank, instead of demanding from the co-obligants the interest due at the end of the year, choose, in concert with the obligant, who is authorised to operate on the account, to avail themselves of their privilege of accumulating that interest with the capital without any communication with the other obligants, they are dealing with the account, in so far as these other obligants are concerned, in precisely the same way as if the leading obligant, instead of paying the interest otherwise at the end of the year, had given the bank a cheque for the amount on the cash-credit account with which the bank extinguished the interest, and then place the amount of the cheque to the debit of the cash-account as an ordinary draft. In this last case there can be no doubt that the credit would be additionally exhausted proportionally to the amount of the cheque given on payment of the interest; and if the full sum of the credit had been pre-

viously drawn out, the cheque for the interest would be an unauthorised overdraft for which the other co-obligants could not be made answerable. But does it make any difference that, without a cheque, the same amount is placed to the debit of the account, and thereafter dealt with as a principal sum drawn out? I think not. The privilege of a banker to balance the account at the end of the year and accumulate the interest with the principal is founded on this plain ground of equity that the interest should then be paid, and because it is not paid the debtor becomes thenceforth debtor in the amount as a principal sum itself bearing interest." So that the result of that case was what I say, that at the end of the account you have just to take the balance as it then stands. The yearly interest added to the principal was treated as principal, and the £800 at the end of the account being treated wholly as principal, the cautioner was held liable only for the £400 at the end of the account, and with interest from that date. (See also *Gilmour v. Bank of Scotland*, 7 R. 734; and *Ellis*, 1 Ex. Div. 157.)

The only other thing about these cash-credit bonds is this, that they are binding not only upon the cautioner, but on his heirs. In illustration of this, I may quote the case of the *British Linen Company v. Monteith and Others*, February, 1858, 20 Dunlop, p. 557. In that case, after an interval of fifteen or twenty years, the representatives were held liable, and the plea for the defenders was that the bank had not made any intimation to them of the subsistence of the bond. The Court ruled that the bank was not bound to make intimation; that a cash-credit bond granted by a cautioner and other obligants is binding on his representatives without notice to them.

Then there is a matter in regard to continuing mercantile guarantees. You may have a guarantee for a particular debt, due at this date; but there is a species of obligation whereby you may become bound for debts that may in future be incurred by the principal debtor to the creditor. These are called continuing guarantees, and the banks often take them in security for overdrafts, usually by a letter from a cautioner obliging himself for any sum that shall be the balance upon the drafts by the customer of the bank during any period whatever, and sometimes also by a mere promissory note; *City Bank*,

7 M. 757. These are continuing guarantees, and the heir of the granters will be bound by the letter, though the bank do not give notice to him; see *Caledonian Bank*, 8 M. 862. There are peculiarities in regard to these guarantees. In the ordinary case the cautioner engages for one debt payable, say, on the 1st January; the creditor is not entitled to make any alteration on the term of payment. If he makes it the 15th May, or any other date, by an arrangement between himself and the principal debtor, that will free the cautioner, because he will be entitled to say that is not the debt which he became bound for. But it is important for mercantile men to observe that it is quite in the power of a creditor in a continuing guarantee to take trade bills for the debt. Suppose I am a merchant supplying goods for a customer, and I have got a continuing guarantee for all the goods that I shall supply to the particular customer, I am quite entitled to give that customer the usual trade credit; nay, I am entitled to take bills at any discountable date, so as to postpone the term of payment to a reasonable date. I would not, in doing this, discharge the cautioner, the reason being that in these continuing guarantees the cautioner is liable for what may be incurred by the debtor in the ordinary course of business; and anything done by the bank, or the creditor who supplies the goods to the debtor in the ordinary course of business, will be good against the cautioner.

There is just one thing I want to tell you about, and that is a very common thing that occurs where bankers are asked by a customer, or by another bank, as to the state of credit or mercantile position of certain parties, and on this subject I want to give you one or two words of warning. For instance, the Union Bank is asked by a customer as to the credit, say, of John Smith, and whether he is good for £2000, or as to whether he was a man to whom the customer should give credit for £2000. In answering a question such as that, would the bank incur any liability? As to this question, I want to direct your attention to the case of *Swift v. Jewsbury*, 9 Law Reports, Queen's Bench, p. 301. There the Gloucestershire Banking Company were asked by H. J. Wells, sub-manager of a Sheffield bank, in these terms:—"I shall be much obliged by the favour of your opinion,

in confidence, of the respectability and standing of Sir W. Russell, Baronet, M.P. for Norwich, and whether you consider him responsible to the extent of £50,000. H. J. Wells, sub-manager." Mr. Goddard, the local manager of the Gloucestershire Banking Company, replied in these terms:—"Gentlemen, I am in receipt of your favour of the 8th instant, and beg to say, in reply, that Sir W. Russell, Bart., M.P. for Norwich, is the lord of the manor of Charlton Kings, near this town, with a rent-roll, I am told, of over £7000 per annum, the receipt of which is in his own hands, and has large expectancies; and I do not believe he would incur the liability you name unless he was certain to meet the engagement.—I am, gentlemen, yours faithfully, T. B. Goddard, manager." Well, it turned out that this was entirely false; that this Sir W. Russell was worth nothing, and that Mr. Goddard, the bank agent who signed this letter, knew, or had information that that was the case. The customer of the Sheffield bank who had made the inquiry had advanced £3000 on getting this assurance from the Gloucestershire bank. The Court held that, while the bank was not liable, this bank agent who had so answered the letter was liable for the whole £3000, the reason being that he had given an assurance which was false, and which he knew to be false, in regard to the credit of his customer. That is a thing worth keeping in mind. The law on the subject is fixed by the sixth section of the Mercantile Law Amendment Act: "All representations and assurances as to the character, conduct, credit, ability, trade, or dealing of any person made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations, assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect." I do not say these representations are cautionary obligations, but they are of the like effect. The man who advances a statement such as that made by Mr. Goddard renders himself liable practically as a cautioner for its honesty. Now, if an inquiry of that sort is addressed to you, you are quite free to

answer it, provided you answer in good faith, and if you have reasonable and probable grounds for what you say. If you are asked whether this man is good for £50,000 or £5000, you are quite safe to reply, if you make the answer in good faith, and if you have reasonable and probable grounds for what you say; but you must observe, if you make an affirmative answer, without knowing whether it is true or false, that he is worth £50,000 or £5000—if you make an answer recklessly, not knowing anything about the matter, and make it in writing, you run the risk of being held liable for the sum advanced on the faith of your recommendation. Another case is, and of course it is not a thing that will occur with any honourable man, and that is the case where, being asked whether a man is good for so much money, you answer that he is good, and you know that to be false. If you know it to be false, as Goddard did, you will be held liable. There are thus three rules to be observed :—If you are acting in good faith, and on reasonable and probable grounds, then you are not responsible; but if you answer recklessly, without knowing anything of the matter, that the proposed advance is safe, then, if the man is not good for the money, you will be liable, probably as if a cautioner; and third, if the representations you make are known to you to be false, then undoubtedly, as in Goddard's case, you will be held liable.

LECTURE IV.

GENTLEMEN,—At our last meeting we were considering the subject of representations as to character or ability to pay, addressed by a bank or by any person to somebody who is going to trust the party inquired about with money. In pursuance of the same subject, I am now to bring under your notice one or two cases in which a person may become liable really as a cautioner by making representations which turn out to be false, and which are, in short, misrepresentations. And, in dealing with this whole subject, you must remember that we can, at the very most, simply indicate equitable principles which govern the subject as a whole and in general. The application of these principles to particular cases must always be taken with caution. You are not to assume at once, because you find equitable principles stated broadly, that they are to be applied without consideration or without discretion, as if they were rigid technical rules. All one can do in this matter is simply to state broad principles of fair dealing as between man and man which the law has laid down, and leave it to your discretion and your own prudence to say whether or not they apply in any individual case.

Well, for instance, any representation made by a person who knows that a merchant, say, is going to supply goods on the faith of that representation, will bind the person who makes it, if it should turn out to be false, either to his knowledge, or false in so far as he did not know anything about it. This principle in law is best illustrated, I think, by a case, and I have taken one from an English book, *Barwick v. The English Joint-Stock Bank*, 2 Law Reports, Ex. p. 259. In that case a firm of merchants were about to supply goods to another person, and they had doubts as to his ability to pay; so they went to his banker to ascertain

whether he was good for the amount. Now, that is just the very case I am putting to you. They went to the banker to see whether he was good for the price of the goods. The bank wrote back in these terms, and they are worth noticing:—"Referring to our conversation of this morning, I beg to repeat that if you sell to, or purchase from J. Davis & Son, not exceeding 1000 quarters of oats for the use of their contract, I will honour the cheque of Messrs. J. Davis in your favour in payment of the same, on receipt of the money from the commissariat in payment of forage supplied for the present month, in priority to any other payments, excepting to this bank." Now, you see what the bank did was, they said, we will see you paid, out of an expected fund, the price of the goods that you are going to supply in priority to any payment, except to this bank. That seems a very innocent guarantee; but then, in giving this letter the bank did not tell the person to whom it was given that the customer who was to get the goods was owing them £12,000. They concealed the fact that that debt was owing, and when the seller did supply the goods and passed the cheque for the money, the bank met him by saying: "Oh! but there is a debt of £12,000, and that more than swamps all the fund which we promised to apply to the price of the goods." The seller turned round and said that there was a misrepresentation on their part, as they had never told him of that debt; and he said the fair and honest meaning of the letter which the bank had given him was that he should be paid out of the funds of his debtor coming into their hands. He urged further, that his attention had not been directed to the words that he should only be paid after the debts owing to the bank. This is an illustration of the nicety of the subject. The Court held the bank to be liable for the full amount of the price of the goods, if the jury should hold the terms of the letter misleading and deceitful. They said that this was not an honest letter, and that the representation by the bank in the letter was calculated to deceive, and did deceive, the man who supplied the goods. The view adopted by the Court was, in short, that this was a misrepresentation by the bank of the true state of the matters, and the bank was held liable exactly as if there had been no qualification. So that shows the

nature of the representations which will be held to affect a person. Any representation that is honestly made, and believed with reasonable and probable cause, to be true, will not in any way create liability though it may turn out to be erroneous; but if it is made dishonestly, or made in a sly, underhand fashion, calculated to mislead, as in this case, then the Court will hold the person making the representation liable. Here is another instance of liability incurred by false representations—namely, the case of the *Bank of New Brunswick, L.R.*, Privy Council, vol. v. p. 394. A merchant in Liverpool was requested to accept bills sent by the Canadian Bank to Messrs. Glyn. Upon their being presented, the merchant telegraphed to the drawer—"I won't accept these bills unless remittances are received to meet the others," which had been accepted previously. The Canadian Bank sent a telegram to Liverpool—"Sent last mail, Langley." Langley was the name of the drawer of the bills held by the bank, and this telegram led the acceptor to believe that Langley was still carrying on business, and was still solvent, while the bank, in sending that telegram, knew that he was insolvent and had absconded, and did not reveal these facts to the acceptor. It was true that Langley had sent remittances for the first bills; but the bank, in sending that telegram, which was true to the letter, nevertheless did not inform the acceptor that in reality the drawer was bankrupt, and was of no use whatever. In these circumstances the merchant in Liverpool accepted the bills for £20,000, and he had to pay them. The acceptor, in order to meet his loss on these bills, raised an action; and it was held by the Privy Council that he was entitled to recover the whole amount from the Canadian Bank, on the ground that the bank had made a false representation to induce him to accept. So, you see, the point is just that the law requires fair dealing between man and man in making any representations with intent to induce a person to undertake an onerous obligation—to accept a bill or give goods. If you make any representation with the view of inducing a man to do that, it must be honestly made in the knowledge of its truth, or, at all events, with probable grounds. When it is dishonest, and given in opposition to the truth, you will be held liable for the damage, exactly as if you were cautioners. There are other cases

of representation which also have to be kept in view. For instance, if you get a cash-credit bond drawn out in name of the debtor and, say, four cautioners. Well, if the debtor and three cautioners sign, one is apt to imagine it is quite safe to advance money on the bond. I want to impress upon you that that is an erroneous view of the subject. The obligation of the co-obligants is not worth anything unless all of them sign the bond. That is a mistake which bankers have made, and it is right you should know that is a rock on which other people have split, and on which there is no need that any one should split in the future. If I agree to become a cautioner with two or three other persons, and if we all sign with one exception, the obligation is worth nothing at all, because it has not been completed in the only form to which we agreed. It cannot be used, and even if you advance money upon it, you will not be able to recover money from anybody but the principal debtor. That was decided in the case of the *Edinburgh and Leith Bank v. Paterson*, 6 Dunlop, p. 987. There is another thing to be kept in view by bankers and others who take as securities bonds of caution, and that is the risk of there being a forgery of one of the signatures to that bond. That falls upon the bank—upon the lender and the creditor. It is held that if a private creditor demands security, he should provide against the risk of the signatures of one of the cautioners being a forgery on the part of the debtor. That has been held repeatedly in cases, for instance, where a bank requires a cash-credit: if one of the signatures is a forgery, the obligation cannot be enforced against any of the other cautioners, because the understanding is that they must all be bound, validly bound, and the creditor must see that they are validly bound or he has no security. The practical inference from that is, that bankers and others requiring cash-credit bonds ought to see that the cautioners sign their names before an agent of their own—that is, that they should not entrust the debtor with the subscription of the bond. That rule has not been held to apply to the case of a judicial cautioner, as in a suspension, where the debtor has to find caution. There, even though the signature of one of the cautioners should be forged, the creditor will be entitled to proceed against the other; but with that you are not so much concerned. The

thing is, to know that in private business the risk of forgery of one of the signatures falls upon the creditor, and that the bond will be thereby spoiled altogether. (See *Pringle*, 20 D. 465.)

The next special subject in the law of cautionry that I have to submit to you is one of considerable importance to the banking interest, and that is bonds of caution with reference to the discharge of office—say for the office of bank agent, because that particular office falls simply under the rules as to bonds of caution for any office whatever. In this matter the rules laid down are distinct. The cautioner, as we saw in our last lecture, is a person who has become liable for the debt of another, to pay it if he fails. It follows from the very definition of a cautioner, that he is entitled to know the full extent and the nature of the contract for which he becomes bound. It is another man's debt, and he is to become bound for it, and it is at the creditor's peril if the cautioner does not know the whole bargain between him and the principal debtor. Usually this appears fully enough from the very terms of the bond presented to the cautioner for signature. But if the cautioner is able to say: "Well, you took me bound for this debt, but you laid before me a statement that he was only owing £10,000, when really he was owing £20,000 by a private agreement;" he might annul that bond and set aside his obligation on the ground of concealment of facts material to the risk. That applies to the case of a bank or any employer demanding security for an agent who is already in arrear to them. If, for instance, they demand security for an agent in arrear, and do not reveal the extent of the arrear, or do not reveal that there is an arrear at all, then the cautioner will be entitled to say: "You did not reveal the whole contract between you and the debtor, and I am not bound at all." In the case of an agent, the cautioner is always taken bound for the future transactions of the agent. If that is done under any circumstances of concealment, the bond of caution will be bad. If, for instance, an employer has come to think that his agent is not trustworthy, or has reason to believe from his conduct that he is not trustworthy, and if, nevertheless, he goes and takes a bond of caution from third parties, who know nothing about the agent, but the fact that he is occupying an honourable position,

without explaining the special circumstances under which the bond is taken, that bond will be declared null. In the ordinary case of caution being taken for one definite debt, the creditor may not be bound to communicate his reasons for requiring security; but especially in the case of continuing cautionry, when the bond presented for the cautioner's signature does not set forth the whole contract between the creditor and the principal debtor, or when it represents the latter as holding a different relation to the creditor from that which he truly occupies, there is a duty of full disclosure to the cautioner, which, if not discharged, will invalidate the guarantee.

These are the principles that apply in special cases to the taking of bonds for the discharge of an office or for the duties of a public post; but of course they are principles which apply to the whole system of cautionry. We have already seen that the utmost fairness in dealing is required in taking a bond from a cautioner. He must be informed of the whole nature of the contract with the principal debtor, and nothing must be concealed from him that is any material part of the risk he is undertaking. The cautioner is entitled to take up the position :—"I am intervening for behoof of the principal debtor, and I do not know any of the circumstances except what you tell me, and I am entitled to be fairly told as to the risk I am undertaking." If the creditor, thus appealed to by the cautioner, makes him believe that it is just an ordinary case, and yet there was more behind that would materially affect his mind, then the bond will be null. This is an important principle, and it may be worth while to cite a few authorities on the subject to you. In an English case, the Lord Chancellor Abbott, in page 52, vol. 3, of Ross's *Leading Cases*, says : "I am of opinion that a party giving a guarantee ought to be informed of any private bargain made between the vendor and vendee of goods which may have the effect of varying the degree of his responsibility. Here the bargain was that the vendee should pay, beyond the market price of the goods supplied to him, 10s. per ton, which was to be applied in payment of an old debt due to one of the plaintiffs. The effect of that would be to compel the vendee to appropriate to the payment of the old debt a portion of those funds which a surety might reasonably suppose would go towards defraying the debt for

the payment of which he made himself collaterally responsible." I should explain that the guarantee there, was a guarantee for £200 for supplies of pig iron. The creditor and the principal debtor bargained that the debtor should pay not merely the market price of the iron, but also 10s. extra per ton on every delivery, which 10s. was to go to an old debt due to the creditor and not in payment of the iron. The cautioner, when sued for the market price, said: 'You had a private bargain which you did not tell me anything about; the contract was not fully revealed,' and the Court agreed that he was not bound. The other Judges somewhat broadly laid it down that it is the duty of a party taking a guarantee to put the surety in possession of all the facts likely to affect the degree of his responsibility; and, if he neglect to do so, it is at his peril; and that a surety ought to be acquainted with the whole of the contract entered into with the principal.

That is a doctrine which is really worth keeping in view. This principle applies especially to the case of a bank agent, because there is a special confidence and privity between such an agent and his employers which widely distinguishes caution for him to the bank from an ordinary mercantile guarantee for debt. In the case of *Smith v. The Bank of Scotland*, 1829, p. 66, Ross, vol. 3., the Bank of Scotland had come to know that one of their agents was grossly in arrear. He had been speculating, and had got into large arrears, and they required new caution. The bond was made out in the usual way, revealing nothing special, and taking the cautioner bound for the past as well as for the future transactions of the agent. The agent went bankrupt, and the cautioner was sued for the defalcations; but he was found not to be liable both in the Court of Session and in the House of Lords. The remarks by Lord Chancellor Eldon are worth noticing:—"If an agent has been guilty of embezzlement or other improper conduct unknown to his employer, the cautioner would be liable. But if the man found that his agent betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt; if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person, knowing or having ground to believe that he was not so, then it was agreeable to the doctrines of equity, at least in England, that no one should be

permitted to take advantage of such conduct, even with the view of security against the future transactions of the agent. The cautioners here said that they were taught by the bank to believe that Paterson was a good man, when the bank knew or had reason to believe that he was not so, and they offered to prove that the bank did, at the time of requiring this additional security, know of Paterson's misconduct or had good reason to believe that he had misconducted himself." The Court held that a bond taken in such circumstances by the bank would not stand. So the first thing which you will observe in regard to this bond for discharge of office is, that the utmost fairness must be shown to the cautioner at entering into the bond. He is entitled to know the whole contract with the agent or the officer, and he is entitled to know whether there is any reason to doubt that the agent is a trustworthy person, and any failure in due disclosure of special circumstances (if any) affecting the risk will be fatal. It is not necessary that the concealment should have been intended to commit a fraud on the cautioner. It is fair that the cautioner should know the material circumstances; and if these are kept back from him, and if he has not had laid before him the full special elements of the risk as known to the creditors, the bond will be of no avail.

The next thing to be kept in view in regard to these bonds is as to the nature of the supervision which the cautioner is entitled to expect from the bank or the employer in regard to the officer. Now, as to that, it is to be observed that if the cautioner stipulates in the bond for any regular system of supervision, that system must be strictly followed out. If, for instance, a cautioner has got a clause in his bond that the ordinary supervision exercised by the bank over its agents shall be used, the bank will not be able to enforce their bond unless they have clearly and strictly followed the rules of supervision put down in the bond; but if the bond contains no clause requiring the bank to supervise the agent, then the matter is different. A good deal of discussion has arisen as to what are the precise obligations between parties for supervision when the matter is left to mere implication from the contract; but the present state of the law is that the cautioner will not be relieved by any mere negligence on the part of

a bank to supervise, unless he has secured himself by a clause requiring supervision. How far negligence on the part of the bank may go without freeing the cautioner is another matter. Of course the position of the employer is: "I take the bond of caution for the very purpose of preventing or securing myself against irregularities on the agent's part, and I do not undertake to protect the cautioner by any peculiar checks whatever." The cautioner, on the other hand, says: "I was entitled to rely on your acting in the ordinary course of business, and you have done wrongfully by me; the moment you got the bond of caution, you allowed the agent whom you employed to do exactly as he liked." However, the law has decided between these two contending equities, with the result that mere negligence in supervision will not be enough to relieve the cautioner, unless it amounts almost to actual connivance in the agent's wrongdoing, so as to show that the employer knew or might easily have known of the agent's misdoings, and acquiesced in them or wilfully did not check them. That is a matter of so much consequence to your profession, that I may be allowed to refer to the doctrine in the case *Biggar v. Wright*, Nov. 19, 1846, 9 D., p. 78. The Lord Justice-Clerk there says: "It has been argued in most of these cases that neglect by the creditor of the regular control, which the nature of the trust enabled him to exercise over the principal, and which, in the ordinary course of things, it was to be expected he would exercise, came really to make a variance in the contract between the creditor and the surety by the change in the mode of conducting the business, as to which the surety interposed his obligation. That is the ground on which a plea for the surety has been always rested. The mistake in that view is twofold. First, the cautioner does not stipulate as he might do for an observance of any particular checks and mode of superintending the principal's conduct. He might make any stipulations on that head he chooses if the creditor would accede to them. He does not do so. The bond contains no such stipulations. Then can a Court of law give him not only the full benefit of such a clause when it is not in the bond, but even more benefit than any specific clause could give him by holding by implication that he has the protection of a general and expanding equity sufficient to meet any species

of neglect which the actual facts may happen to exhibit, and which equity comes to be a condition precedent to enforcing the bond? This, in truth, is making a new contract. Let the cautioner propose the stipulations he thinks necessary. If he does not get them, then let him inquire and ascertain how the party is going on for whom he has bound himself. Second, the character of the business or trust is not altered merely by the neglect and omission of the creditor. Superintendence is relaxed or neglected. But that is all. Hence there are two assumptions in the ground on which the plea of the cautioner is rested, each unsound." So that the existing authorities on the subject are, that unless a cautioner has stipulated with the bank as to the checks to be used towards the bank agent or officer, mere negligence in supervision on the part of the creditor will not be enough. He will require to go further and show something like fraud or actual connivance on the part of the creditor before he can get rid of the bond; but if the cautioner can show that the employer has connived at the agent's irregularities, then he will be freed from his bond.

The next thing to be observed about these bonds is, that any material change on the duties or responsibilities of the officer after the bond is granted will free the cautioner. I should imagine that is a thing that is not very much kept in view among mercantile men and even bankers. They may imagine that the change is slight and trifling, or they may really forget the terms of the bond for the moment; but a change so slight as this has been held to free a cautioner. A bank agent employed originally under caution as a teller upon a salary, was afterwards sent out to Dalkeith as a bank agent, and his salary was increased, but he was made liable to the bank for a fourth of any losses upon discounts. That was not in his original agreement. At the end of the day he was short in his cash, and a claim was made on his cautioner. There were no losses by discounts or in any way through the change of his employment, but the loss was through speculations which the agent engaged in. The cautioner here pleaded: "You have changed the nature of the agent's duties since I become bound, and I am no longer liable;" and the Court said he was right. A material change had been entered into in reference to the nature of the agent's duties and liabilities, and therefore

the bond of caution was no longer available to the creditor. On this subject, as in most other branches of the law of cautionry, the same law exists both in England and Scotland. I observe a case in the English books the other day where a man was employed to act as officer to a Poor Law Union, and they merely changed him to be collector of poor rates, which did not essentially affect the nature of his duties; but the Court held that there was a difference—that this was not the office for which the cautioner became responsible, and the surety was consequently held not to be liable. So you see, and this is a main point to be observed about these bonds, that any change in the nature of the duties made after the bond of caution, and without the consent of the cautioner, will relieve him of liability. Caution for an officer engaged year by year will not last beyond the first year, unless it be expressly or by necessary implication contracted for the whole time the agent or officer may remain in office.

Another thing to be noticed in regard to these bonds is, that the cautioner may always withdraw from the liability at any time during the currency of the office, or during the currency of the bond, upon giving reasonable notice to the bank or to the employer. He is not entitled to do so arbitrarily or capriciously, or unreasonably. He is bound to allow time for a new cautioner being got. But he is entitled to give notice that he shall be no longer liable. It follows also from the nature of the obligation, that such bonds are binding upon heirs. For instance, when a cautioner dies his heirs will be bound to the bank, and the bank will not require to give any intimation to the heirs. That is also the law, as we saw in our last lecture, in regard to cash-credit bonds. The heirs of parties who grant such bonds remain liable perhaps years after their predecessor is dead, and although the heirs may never have heard of the obligation. This seems to me not a very fair state of the law, for it is probable that the representatives of a party would not continue liable if intimation were given. The law has settled that a bank is not bound to give intimation to them, although it would seem a fair thing that they should receive intimation. It has, however, been held that a bank will be kept very strictly to fair dealing in regard to such representatives who get no intimation at all.

If the bank has in any way led these people to imagine that no obligation exists, the bank may easily be held to have waived and discharged their obligation altogether.

These are the principal points that I wish to bring before you in regard to bonds of caution for the discharge of an office. Universally there must be fairness in entering into it; during its continuance there should be fair supervision; any material change in the office will relieve the cautioner, and he may terminate his liability for the future by giving reasonable notice to the bank.

The remaining subject that we have before us to-night is as to how cautionary obligations are discharged. In regard to that, I have given you repeated warning that by cautionary obligations you are not to understand only obligations in which the obligants are taken bound expressly as cautioners. I mentioned to you that wherever you have got the essence of a cautionary obligation, namely, a principal debtor and other parties who are in no way connected with him, save as becoming obligants for him and with him—wherever you have the essence of that in any form, by bills or bond, or by a letter, or in any conceivable form whatever, then you have all the rules and equities of cautionry imported and established. Now, here the first point to be noticed is the mode of discharging cautionary obligations. There is a special limitation, the septennial limitation, for proper cautionary obligations. That is to say, wherever you have got the parties bound expressly as cautioners, binding themselves expressly in name as cautioners, or wherever you have got persons bound as co-obligants along with another, but having a clause securing their relief (a term we explained at last lecture) against the principal debtor, or a bond of relief intimated at the time of taking the bond of caution to the creditor—wherever you have these things concurring, then the bond falls of itself, on the lapse of seven years from its date. That is the septennial limitation of cautionary obligations. It applies, as I have already said, purely to proper cautionary obligations, where you have the parties bound, either in so many words as cautioners, or have an express clause of cautionary relief intimated to the creditor at the time. This septennial discharge is therefore limited in its application. It does not

apply to a great many of the most common forms of cautionry. It applies only to caution for sums of money. It does not apply to obligations *ad facta præstanda*, for instance, to deliver goods, nor does it apply to a judicial caution, nor does it apply to bonds of caution for the discharge of an office such as we have just been considering; because a bond of caution for an office generally contemplates endurance for more than seven years. Nor would it apply to a cash-credit bond, as that also contemplates a period of indefinite duration. So you see that this first mode of discharging a cautionary obligation is rather limited in its range; but within its own limits it is effectual.

The second mode of discharging cautionary obligations is, that wherever the principal debt is discharged the cautionary obligation falls. I need not dwell upon that, for, of course, that is a necessary consequence of the nature of cautionry. It is an obligation for another man's debt, and when that debt is discharged, the cautionry falls with it.

The third mode of discharge is one peculiar to cautionry, and depends upon the equities that a cautioner is entitled to; and it occurs whenever a creditor has made any material change in the nature of the arrangement between him and the debtor. That follows really from the nature of cautionry. If I become bound for a certain debt upon certain terms, and if, after I have become bound, the creditor and principal debtor make a new arrangement altering the terms of the bargain, then I am entitled to say, that is no longer the debt for which I became bound, and I am free. Any change, in short, which increases the risk of the cautioner, or which merely alters his risk, which makes it different from what the cautioner undertook, will free the cautioner. Cases of that kind are of frequent occurrence. I recently saw an American case depending in this matter on the same law as ours, where an agent was originally employed on a salary. He got a cautioner to become bound for him; but, afterwards, without asking the cautioner's consent, the terms of his remuneration were changed from a salary to a commission, and it was held that this seemingly slight change altered the nature of the obligation for which the cautioner had become bound, and the cautioner was freed. We have had other instances of similar

changes in duties freeing the surety, which I have mentioned before in connection with the law of cautionry for an office. It, however, is a general principle to be kept in view, that alterations, in the nature of the arrangement between the principal debtor and the creditor, effected without the consent of the cautioner, will discharge the cautioner.

The fourth mode of discharge is perhaps only an incident of the third, and that is "giving time." If the creditor "gives time" to the principal debtor without the consent of the cautioner, that discharges the cautioner. The giving of time is a technical term which requires explanation. Giving of time does not mean merely that the creditor forbears enforcing his debt, that he merely lies on his oars, and does not exact payment of his debt with rigorous punctuality. Giving time implies that the creditor shall have made a new and special bargain with the principal debtor whereby he ties up his hands from proceeding against the debtor for a certain space—no matter how short, no matter how long. If he makes a new agreement of this description with the principal debtor, the cautioner is no longer bound; and it does not matter though this giving of time does no harm practically to the cautioner. All that the cautioner requires to show is that, despite the terms of the original debt, the creditor has granted to the debtor a postponement, and has tied up his hands for a definite period. One common way in which that may occur is illustrated in a bank case, which went to the House of Lords. It was simply this, that the creditor acceded to a trust-deed, granted by the principal debtor, possibly without specially noticing that the trust-deed contained an obligation on the acceding creditors not to do diligence for a certain space of time, which is what is called a *supersedere* of diligence. The creditors of this principal debtor, including the bank who held the bond of caution, agreed that they would not proceed against him for three months. At the lapse of that period the bank attempted to enforce the bond against the cautioner, who had been no party to the arrangement. The cautioner, however, replied, "You have given time. The debt was due and payable at the date when you entered into this *supersedere*, and you acceded to this arrangement without consulting me. You have taken the debtor into your own hands, and I am no

longer bound." This defence by the cautioner was sustained in the House of Lords, and also in a similar case with the Bank of Scotland, *Thomson*, 2 Shaw's App. at pp. 346-47. Then there is a strong case (*Richardson*, 15 D. 628), one of the strongest examples of this doctrine that I know of, where a man became cautioner for a farmer's rent. The cautioner became bound for the rent as it fell due at Martinmas and Whitsunday. But the creditor went and took a bill from the tenant, payable on the 28th May, for the Whitsunday rent—a very short postponement after the legal term. For the Martinmas rent the postponement similarly given by bill was one month, and for the Whitsunday rent the postponement was no more than about fourteen days. After taking these bills the creditor attempted to enforce payment of the rents under the original cautionary obligation. The cautioner, however, met him with the plea—"You gave time; you tied up your hands as against the principal debtor, and I am no longer bound." The Court sustained that plea. That is really a very striking instance of this mode of discharge. The Lord President in giving judgment, remarked:—"The broad principle of the matter is that when a person becomes cautioner for a debt payable at a given time, and especially when it is one with certain rights in the original creditor against the debtor, such as a landlord has against his tenant, if the creditor gives time without the concurrence of the cautioner, that liberates the cautioner, because that amounts to an alteration of the contract, and the question truly before us is whether that has been done here." The other Judges concurred, Lord Fullerton in particular observing:—"I am of the same opinion. No doubt it is a very narrow and a very hard case. The pursuer takes from his principal debtor bills in which the terms of payment are delayed. Where a party takes bills that postpone the period of payment, the presumption is that he did not grant that postponement for nothing. No doubt, very little would take off that presumption; but there is nothing here to take it off." This suggestion of the reason for the rule is not very satisfactory; but you see in that case the landlord lost his security merely by transacting with and taking bills from the principal debtor. By giving the debtor delay during the currency of those bills, he tied up his hands for a short period indeed; but it was sufficient

to free the cautioner. The distinction between taking bills where there is caution for a specific debt and where there is a continuing guarantee for over-drafts or supplies of goods is nowhere more clearly brought out than in the opinion of the Lord Justice-Clerk, in *Stewart*, 9 M. 763 :—"It is different," he says, "when the guarantee regards not a specific obligation but a course of dealing for the future. In such a case, the cautioner, if there be nothing expressed in his obligation, is not presumed to grant it on the faith of any specific conditions, but rather to have contemplated the general usage of trade and the ordinary credit given among merchants. When one guarantees all goods which may be furnished to a trader, or all bills which may be discounted by a banker, as a cautioner, he necessarily by the generality of the obligation leaves the principal debtor and creditor free to arrange the details of the transactions as they think fit, provided these are not at variance with the ordinary custom of merchants. This is the principle of a general guarantee, and it has been frequently applied." Another illustration of the general rule against giving time occurred in a case in 1859, *Forsyth*, 21 D. 449. A creditor in a bond, dated in 1844, by which the cautioner was bound for interest, took, without the knowledge of the cautioner or of the principal debtor, another obligation from a third party, dated November, 1849, whereby on condition of the debt not being called up before Whitsunday, 1850, this third party bound himself for regular payment of the interest while the principal sum remained unpaid. All that was done was, that by a new contract with a third party, the creditor agreed to a six months' postponement of the debt. Nothing more occurred till 1855, six years afterwards, when the creditor attempted to enforce the bond against the cautioner. The period of postponement had passed and gone. It had done no harm; but the cautioner nevertheless came forward and said—"I am no longer bound, because, behind my back, you made an arrangement whereby you tied up your hands for six months, as against the principal debtor." The debt was due and payable as at the date when the creditor agreed to the delay, and he had given time without the cautioner's consent; therefore the cautioner was held not to be bound under the general rule. In England it is said that delay stipulated and

obtained by a third party for the principal debtor, will not free the cautioner.

These are examples which I hope will fix in your minds what is the nature of a discharge arising from giving time. It consists in the creditor tying up his hands by arrangement with the debtor, not consented to by the cautioner, whereby the principal debtor gets further time for the payment of his debt. I ask you always to notice that in none of these cases were the creditors chargeable with any undue negligence or delay in lying by and not enforcing their debt; they were simply cases where the creditor bound himself for a short space not to enforce the debt against the principal debtor. That had the effect of altering the terms of the original contract, and the cautioner was not bound. That looks somewhat like a technical penalty on an unwary creditor; but it follows from the nature of a cautionary obligation. If a man becomes bound for a debt payable as at a particular date, the creditor has no right to make an alteration on the terms of the original debt without the cautioner's consent. In a case where the giving time was said to be by undue renewals of trade bills, the issue sent to the jury was whether the creditors gave time beyond the usual period of credit allowed in the trade, *Warne*, 5 M. 283.

Fifthly, a creditor can hardly lose his cautioner by mere delay or neglect to enforce the debt, unless the cautioner be in a position to show that the creditor is acting collusively or fraudulently to the prejudice of the cautioner, *Oreighton*, vol. 7, Cl. and Fin. p. 325. But if the creditor holds out to the cautioner, or acts in any way that leads the cautioner reasonably to believe and to act on the belief, that the cautionary obligation is at an end or is not to be enforced, the creditor may thereby lose his cautioner. An example of such occurred in the case of the Caledonian Banking Company in 1870, 8 M. 862. A cautioner to this bank having died, his representatives, as I told you, were liable, without any intimation. They got no intimation of the subsistence of the cautionary obligation; but the bank went on and dealt with the principal debtor, and had transactions with him, whereby on payment of a certain sum they postponed their balance to other creditors. They got money out of the deceased's cautioner's estate paid to them by his trustees on behalf of the principal debtor, as

the residuary legatee of the cautioner, without saying a word about the cautionry. After the lapse of some years, when the principal debtor's estate did not turn out so well as they expected, they tried to enforce the bond against the trustees and representatives of the deceased cautioner. The Court held there that the bank had acted in such a way as to waive their cautionary obligation. They did not deal fairly, in short, by the representatives. They had delayed enforcing their bond, to the prejudice of the representatives, and a creditor is not entitled to withhold notice of such obligation, and at the same time to profit by the ignorance of the representatives of the cautioner that such obligation exists. So you see that is another of the equities that come in favour of the cautioner or his representatives. If a creditor means to enforce his cautionry, he will not be barred by mere delay; but if the delay can be shown to be to the prejudice of the cautioner, he will be free, it being such delay on the creditor's part as to hold out to the cautioner that there was no cautionry against him at all. That kind of delay will free the cautioner or his representatives, and remove the obligation in the bond. I may notice, in connection with this, that if you get a cautioner for a bill whose name is not upon the bill, it is quite settled he is not entitled to notice of dishonour as he would be if he were the endorser or the drawer.

The sixth mode in which cautionry may be discharged, is by the creditor giving up or losing his securities. If a creditor holds securities from the principal debtor, he holds these securities in law as much for the benefit of the cautioner as for himself. That follows from the peculiarity of cautionry, which I explained in last lecture, which is that a cautioner, upon paying the debt, is entitled to get an assignation of all the securities held by the creditor. He is entitled to demand relief against the principal debtor after paying his debt; and if the creditor holds any part of the debtor's estate, or any security thereon, then the cautioner is entitled to the advantage of these securities. So the law says that a creditor who holds securities over the estate of the principal debtor, and who also has a cautioner, is bound to manage these securities as much for the benefit of the cautioner as of himself. A creditor is not entitled to take up this position, and say, "Well, I have

got a cautioner, and I do not care about this security over the debtor's estate; I will give it up, and I will trust to the cautioner." He is not entitled to do that. He must hold the security for the benefit of the cautioner as well as for himself; and if he fails, so that the cautioner upon payment cannot get an assignation to the securities for his relief, the cautionry falls. For instance, in a case of the Royal Bank, the debtor had granted a heritable bond, which required to have infeftment taken upon it in order to make it complete and effectual. The bank got a cautioner for the debt, and trusting, I suppose, to the cautioner, they never recorded their bond, never completed it in a proper feudal way. The result was, that when they tried to enforce the debt against the cautioner, the cautioner said, "Where is the security you got from the principal debtor? You have not completed it: it is not worth a farthing, and I am not liable for the debt." That plea was sustained. If the creditor forgets or neglects to complete a security got from the principal debtor, to the prejudice of the cautioner, the cautioner is free. The same thing will occur if the creditor holds securities from the debtor, and wilfully gives them up. If the creditor does anything of that sort, in the way of prejudicing the cautioner's right of getting relief or getting reimbursed out of the principal debtor's estate, the cautioner is at once set free. It may be that the creditor is able to show that the security lost was of little value, but to the extent at least of the value of the security lost the cautioner is discharged.

The only other thing we may notice is the seventh mode of discharging a cautioner's liability, and that is the discharge of one of his co-cautioners without his consent. If, for instance, there is a creditor who has a principal debtor and three co-cautioners, and if the creditor discharges any one of these co-cautioners, he thereby in effect discharges all the others, and loses his right as against all the others. That, as has been already noticed, arises from another peculiarity of the law of cautionry, namely, that the co-cautioner is entitled to, and has the right of relief or contribution against the others; and if the creditor, without consulting the other cautioners, discharges one of these cautioners, the law says the creditor should lose his recourse on the bond of caution. That is

fixed by the Mercantile Law Amendment Act. And it is necessary to keep in view, as a practical suggestion, that you are not to imagine that rule applies entirely to people who are bound expressly as cautioners; it applies to anybody who is and is known by the creditor to be in the relation of a cautioner, although he is not called so upon the face of the writing. I only allude again to this matter to remind you of one or two practical rules on the subject. The first is that consenting to the discharge of a co-cautioner in sequestration will not relieve the other co-cautioners; and, in the second place, that if you are going to consent to the discharge of a cautioner under a private composition arrangement, the safe plan is always to give notice to the other co-cautioners before doing so, in order to give them an opportunity of paying up the debt and transacting with the insolvent themselves. Always give this notice, and if the other cautioners do not come forward after getting that notice, then you may concur in a private discharge; but you must take great care in the discharge to reserve your rights against all co-obligants. The discharge ought to bear that the creditor reserves his right against the co-obligants. These are the practical rules that I think it worth while again to bring before you, and with these I think we have completed the subject of cautionary obligations.

LECTURE V.

SECURITIES OVER MOVEABLES.

MR. CAMPBELL said,—The subject with which we are to deal to-night is that of voluntary securities over moveables. I say voluntary securities in order to distinguish the securities of which we are to speak from judicial securities which are obtained in such ways as by arrestments and forthcoming or sequestration in enforcement of the landlord's hypothec. The first thing to observe in treating of such securities is the difference between corporeal moveables and incorporeal moveables. By corporeal moveables are meant such articles of moveable property as you can handle, as furniture or goods of any description; and, with regard to these, the general rule is that they may be transferred always by parole agreement—by word of mouth, followed by delivery. You may buy and sell goods to any extent simply by word of mouth. But in regard to the other class of moveable rights, namely, incorporeal moveable rights, these can only be transferred by writing. By incorporeal moveable rights, which is rather a cumbrous phrase, we mean, in law, such rights as the debts due to a man. For instance, if A is owing a debt to B, B cannot transfer that debt to C, a third party, unless by writing. That is an example of incorporeal moveable right. The same thing applies to shares in banks. These can only be transferred by writing. In many cases there are statutes, as the Company Acts, the Railway, Patent and Copyright Acts, settling the forms of transfer and registration required to pass the property. Incorporeal moveable rights such as patents, and copyright in books or other publications, can only be transferred by assignation registered as appointed by statute. Now, we deal in the first place with ordinary corporeal moveables, that is, goods you

can see and handle, as distinguished from *nomina debitorum* or other incorporeal moveable rights. In regard to these corporeal moveables, as I have said, they can be transferred generally by mere parole agreement, that is to say, by word of mouth, followed by delivery. There is one great class of these corporeal moveables, namely, ships which stand in a different position. The transfer of ships, whether to vendees or to mortgagees, is regulated by Act of Parliament, and can only be effected by registered bills of sale or of mortgage. Still the general rule remains that goods to any extent can be transferred by word of mouth. But when I say transferred, I mean that the contract in regard to them is good if only constituted by word of mouth. The actual right of property—and this is what I wish to impress upon you—in corporeal moveables only passes by delivery or change of possession, from the transferor to the transferee. If I buy so many bushels of grain, the contract is good enough if made by word of mouth; but I only become proprietor of these articles when I attain to possession of them. And in this matter you must keep in view one or two settled maxims of the common law, which rule the whole subject. The first of these is that possession presumes property. Anybody found in possession of corporeal moveables is presumed to be proprietor until the contrary is shown. That is a very important doctrine. It is much more important than it looks, because one consequence is that a reputed ownership is apt to be raised, whereby the goods in the possession of one man, although they really do not belong to him, yet from the mere fact of his being in possession of them, may be made the subject of the diligence of his creditors, and subject to be attached in his sequestration or bankruptcy. In short, goods found in the possession of any man, unless there be some title for the possession, such as that for a manufacturing purpose, which his creditors might in ordinary course expect, the law will presume to be his property, and he will be treated as their reputed owner on bankruptcy. In questions between the true owner and persons deriving right in *bond fide*, by sale or pledge from the possessor and reputed owner, the latter may be held to have full power of disposal, although the goods do not belong to him. This doctrine of reputed ownership is of the utmost consequence to be borne

in mind. It does not apply when there has been a reason in the ordinary course of business or of human affairs, why a person other than the true owner should be in possession of the goods. Take the case of a ship-builder building a ship on the order and for behoof of a purchaser with whom he has contracted. In that case the creditors of the ship-builder are not entitled to assume that every ship in his yard is necessarily his property; and by the common law, as soon as the purchaser has paid an instalment of the price as the ship progresses, the part of the ship then built becomes, without actual delivery, the property of the person who has paid the price. Although it wholly remains in the premises of the ship-builder, there is no reputed ownership to enable the creditors of the ship-builder to seize the ship. But the general rule remains that the person who is found in possession of moveable property is presumed to be the proprietor; and he is the reputed owner in a question with his creditors and third parties generally. The doctrine when thoroughly sifted will be found to be based on the equitable principle that the owner has negligently—by allowing his goods to remain in the hands of the reputed owner—held out that the latter was owner, and so enabled him to obtain credit on the faith of his apparent stock. Where this principle fails, as when the true owner had fair and reasonable occasion in the ordinary course of business, to leave his goods in the hands of another, there is no reputed ownership.

In the second place, the next rule, which really follows from the first, is that no security can be obtained over corporeal moveables unless the creditor gets possession of the articles. That is the safe and general rule on the subject. If you wish to have a security or other right in or over goods, you must take delivery of them. You may get documents to your heart's content, or assignations as binding as possible, but unless you have actual possession of the articles you have no real or sufficient security. In short, the property of corporeal moveables can only be transferred by delivery, and the possession of the transferee which follows delivery. From that I am entitled to make the general observation, and to give the general warning, which I think is safe to be kept in view by all bankers or other persons who are taking securities over

moveables—that there is no certain means known to the law whereby you can make your security effectual over moveable estate, unless you attain actual possession of the goods, either by yourself or by somebody holding for you. It is sometimes the case that a bank, or other creditor lending money over mill machinery, attempts to get a security over that machinery, in so far as it is not heritably fixed to the estate. They have an assignation to such moveable machinery, and a perfect right to it; and they attempt to make their security complete without any change of possession. But there is no means known to the law whereby a security such as this can be completed unless by possession on the part of the assignee. There is a device attempted by bankers, I believe, and it is this:—They get a disposition to the mill itself, with an assignation of the moveable machinery situated within it; and they grant a lease to the mill-owner whereby, apparently, he holds the whole subjects heritable and moveable as a tenant from them. I have to tell you that, in so far as it affects the moveables, that security is probably not worth the paper it is written upon, because there has been no change of possession. The creditor or the bank lends on a fictitious lease; they really never get possession of the goods; and the debtor—the mill-owner—who got the money, has remained from first to last in possession, and, by law, his possession being unchanged, the security is not worth anything at all. That at all events is the current doctrine as to such leases granted by security holders, although there are one or two recent decisions to an effect more favourable to the creditor. With regard to this doctrine of possession being the only way of passing property in corporeal moveables, it is necessary to bring under your notice the changes on the common law, effected by the Mercantile Law Amendment Act, 1856. The first section of that statute provides:—"From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right, from enforcing

delivery of the same; and the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable to or transferable to the creditors of the purchaser." That section was intended to remove one of the great hardships of our old common law prior to the year 1856. The hardship was, that suppose I had bought goods from a man and had actually paid the price, yet, if the goods remained in his possession the law said—"When the seller became bankrupt you were only a creditor for delivery of these goods; the original right of property remains in the seller, and you cannot get the goods." The general creditors of the seller, on this principle, took possession of the goods, and I had to rank for the price I had paid upon his estate. That seemed a gross hardship, and it followed from the doctrine I am talking of, that without change of possession there can be no transfer of property or security in moveables. That section alters the law to this extent, that if I have bought the goods and allow them to remain in the custody of the seller till it is convenient to take delivery, his creditors cannot attach these goods, and cannot hold them against me, provided always that I have paid or offer to pay the price. This statute confers a privilege on the purchaser in the particular case specified, but it leaves the property of the goods sold still by law in the seller. Now it has been thought, under that section, that it was competent, by straining its provisions, to introduce securities without possession, say over a man's household furniture, transferred in the form of a contract of sale, and left in his possession and use. It has been frequently attempted by a man who is lending money to another, to put the loan in the form of a sale, and to take an assignation from the borrower of the furniture in the man's house. It has been often thought that security will stand by virtue of this statute; but it will not. It is not protected by that Act, because the intention of this section is to protect only true sales and not securities in the form of sales, and to authorise goods remaining merely in the custody of the seller, in ordinary course of business, till they are delivered. If goods, alleged to be sold, have been left so that the pretended seller has enjoyed the use of them for an indefinite period, then the sale or security is worth nothing at all, as not having been followed by any change of

possession. There is no way in Scotland to obtain security over a man's furniture, so long as he retains possession. The only way it can be done is for the creditor to put a third party in possession for him, or to have the furniture delivered to a store in the creditor's name, or to the creditor at his own premises. The same thing applies to the case of a bank or other creditor taking a security over moveable machinery. The only way they can make their security effectual is to have the machinery removed, or go into possession themselves. There is no other certain way known to the law of doing it. It is better to mention one or two examples to impress this upon your minds. There is, first, the case of *Sim v. Grant*, 3rd June, 1862, 24 Dunlop, 1033. In that case a man's horse and cart were being seized by his creditor. A friend came forward, paid the money, and arranged with the owner that, in respect of this payment, he was to be the purchaser of the horse and cart; but he allowed the owner and pretended seller to retain the horse and cart, and use them in his business for some months. At the end of that period the unfortunate carter fell into difficulties again, and a new creditor pounded the horse in his possession as belonging to him. The friend who had intervened on the first occasion then came forward and said, "The horse was sold to me: I only left it in the seller's hands, and I claim the property under the Mercantile Law Amendment Act." The court ruled that the Act did not apply for his protection as alleged purchaser. He had left the horse and cart with the owner to be used by him, and had never intended to take delivery as in an ordinary sale. The seller had been left not merely in the custody of the goods with a view to their delivery, but in their use and enjoyment, and the personal contract of sale was worth nothing at all against the seller's creditors. The same thing occurred in the bathing machine case—*Mowat's Trustee*, 4th November, 1868, 7 M'Pherson, p. 59. A person bought the machines and left them with the seller, who was carrying on the business of a bathing machine keeper. He never took possession or delivery of them, and when the bathing machine keeper's creditors came in, he pleaded that he had a security over them under the Act, because he had bought them two years before, and had paid the price for them then. But the

Court again ruled against the purchaser. He had left the goods not merely in the custody of the seller, but in his actual use or possession for an indefinite period, and he had no right to them at all against the seller's creditors. Then there was a furniture case in the year 1848, where a friend had bought the household furniture of a seller who was at the time in difficulties; and he allowed the seller, out of friendship, to have the use of the furniture for some years. At the end of this time the friendly purchaser tried to vindicate the furniture to himself as against a creditor of the possessor; but he was told that he had never completed his sale by possession; that he had no right at law to the goods at all; and his claim, in competition with the creditor, was thrown out. There is one other case, that of the Union Bank, which I mention to show how narrow such questions become in attempts to constitute securities over moveable machinery. It is, *The Union Bank v. Mackenzie*, 27th March, 1865, 3 M. p. 765. The short of the matter came to be that the Union Bank advanced money to enable a person to purchase a mill, with moveable machinery in it; but they took the title to the whole concern, heritable as well as moveable, to themselves. The intended purchaser had no previous right to the mill. The Union Bank retaining the title in their own name, agreed to grant a lease to the intending purchaser, and allowed him to go into possession with no other title than that of a tenant from them of the mill and the moveable machinery. On his becoming bankrupt, his creditors attempted to seize the moveables; but the Union Bank were held to have a good security, because, in that case, their title as the nominal proprietors of the mill and machinery, by their contract, was perfected by possession, following, as in their right, by a tenant who had no title except from them. It would have been an entirely different matter if this intending purchaser had been the owner at the outset, and the money had been advanced in security to him on a title derived from him to the Bank. Had the Bank thereupon, without change of possession, merely granted a lease *pro forma* to the real owner, they would have had no security over the moveables. The Bank's security was saved because, having a good title from other parties, they had attained possession through a new tenant and occupier under them of the mill. Another case to

be noted is that of the *Fife Herald, Orr's Trustee v. Tullis*, 2nd July, 1870, 8 M. 936. That was a case where the landlord of the premises in which the printing of the newspaper was carried on, bought from his tenant the machinery, and all the printing presses. Thereafter, under a new lease of both the premises and the machinery, he allowed the same tenant to carry on the business of printing the *Fife Herald* newspaper with his printing presses. The Court were satisfied that there was a real sale and a *bond fide* lease, but still I think it was a very narrow case in regard to the landlord's right as purchaser of the moveable machinery, with regard to which there was never any delivery or change of ostensible possession. The Court held that the landlord, as purchaser, had good right to the moveables, because the tenant, who was the previous owner of the printing presses, held after the sale simply under a lease from the proprietor, and had so in good faith changed the character and title of his possession. This decision against the tenant's creditors claiming the moveables as his, is considered doubtful by many lawyers. The important feature of the case was, that the buyer was himself the proprietor of the premises in which the moveables were situated, and that the change of possession as to the moveables to that of mere hiring, or tenancy, after the sale, was made most distinct, and it continued for some years. The general doctrine of the law remains, however, the same. Notwithstanding this case, the rule is never to rely on a security over moveables, unless you have got possession either by yourself or by some third party; and, in particular, not to trust to possession attempted to be obtained by granting nominal leases to the borrowers, so that they may hold the goods as hirers or tenants from the lenders. My impression is, that such leases cannot give you any security, and this is confirmed by the bad success of the latest attempt to complete a security in that form—The Heritable Securities Association, 3rd July, 1880, 7 R. 1094. The doctrine of the *Fife Herald* case, that wherever there is a *bond fide* sale of moveables, the buyer may at common law complete his right by leaving the seller in possession on a new title as by a *bond fide* contract of hiring or loan, cannot yet be regarded as established. The same doctrine may yet be extended to moveable securities in the form of sales ;

but the only safe course for lenders on such securities is to keep before them the necessity for dispossessing the borrower and obtaining delivery to themselves or to their order. In the case of an unfinished ship, a lender who took his security in the form of a contract of sale providing for appropriation of the ship to him on his making the stipulated advances, has been lately held, by the Second Division, to have obtained a good security over the ship when the bankruptcy of the shipbuilder occurred before the ship had been removed from the yard—*cf. Roney's Trustee*, 7th January, 1881, and *Cropper*, 8th July, 1880, 7 R. 1108. It is possible that our older law has gone too far in refusing to regard the many occasions which exist in modern business for a man having in his possession moveables which either belong to others, or are subject to rights honestly acquired by others for full value. Our common law, at all events, affords a clear general rule, known to everybody, requiring possession to perfect a right to moveables; and if exceptional cases are to be increased, in which, out of regard for his good faith, a particular claimant to any part of the moveable estate is to prevail over the general creditors, then it is probable that such exceptions should be accompanied by some plan of public notice by registration, such as has been established in England for bills of sale.

The next point of the doctrine of corporeal movables is that relating to an important instrument in commerce, namely, the delivery order. The case we have been considering before was that of corporeal moveables—goods in the possession of the seller or of the party granting the security; and we came to the conclusion that there is no sure way of getting security over moveables in the debtor's possession, unless the transferee effects a change of possession to himself. Delivery orders are granted in the case where the goods are in the hands of a third party—usually a public storekeeper,—upon whom the delivery order is granted, and to whom it is addressed, in the same way as a cheque upon a banker. In commercial centres such as Glasgow or Leith, there are large public stores where merchants in the grain or other trades are in the habit of storing their goods, as they arrive from the ship's side; and these storekeepers make a business of keeping goods for others. They keep regular books for the receipt and disposal of goods warehoused with them, and

warehouse rent and other charges, as for the regular turning of grain, are paid to them upon goods in their hands. Some of these stores are for duty-paid goods, or for goods free of duty, and these are called free stores to distinguish them from bonded stores, where goods are warehoused subject to the lien of the Crown for import duties. Goods in stores free or bonded can be made the subjects of security, or transfer on sale, by means of delivery orders. It is necessary to attend to one or two points in regard to these delivery orders which I will now notice to you. A delivery order, like a cheque, assumes three parties—the granter of the order, who is the owner of the goods, or at least the person in whose name they are warehoused; the grantee in whose favour the order is drawn; and the storekeeper to whom the order is addressed. The usual terms of the order are simple enough. It is—“Deliver to A.B. or his order, so many goods, identified by marks and numbers, or so many bushels of grain from a particular lot lying at present in your store.” It is signed by the owner, and is in favour of the particular party therein named. That order is not of the least use to the grantee until he has gone with it to the storekeeper, and has got the storekeeper to transfer the goods to the grantee's name. To obtain an effectual security under that delivery order, the essential matter is to intimate the order to the storekeeper, and in order to prevent any questions, to get his consent to hold the goods thereafter for you. The usual form in which this consent is witnessed is a letter from the storekeeper to the grantee, whereby, in respect of such and such a delivery order, he acknowledges that he holds the goods on behalf of the grantee. That is the proper form of completing the transaction. If you do that, he holds the goods for you as he previously did for the granter of the delivery order, and the security is complete: you have what the law regards as sufficient possession. A delivery order very often is transferred from hand to hand. The original grantee indorses it “Deliver to so and so,” and it may be indorsed twice or thrice over. It would be a mistake, however, to imagine that the delivery order, though capable of indorsation, is a negotiable instrument. It is not such. By a negotiable instrument, you will understand, an instrument like a bill which, by the law merchant, as by the law of the

land, passes from hand to hand like cash. In England, until lately, the general rule was that no assignee or indorsee to a right of action acquired any right to sue in his own name; and it was accordingly a distinguishing mark of a negotiable instrument that the indorsee could sue upon it. In Scotland any right of action or document of debt may be assigned so as to give the assignee a right to sue in his own name; and yet many documents, such as deposit receipts, which may be assigned by mere indorsation, are not negotiable instruments. The chief privilege, in Scotland, of the typical negotiable instrument, the Bill of Exchange, is that the indorsee or holder for value has no concern with the original contract out of which the bill arose, nor with the liabilities of the prior parties as between one another; they are all alike absolutely liable to him according to their places on the bill, and the indorsee is subject to no exceptions, such as of no value, which might be pleadable in special circumstances by the acceptor against the drawer. The *bond fide* holder for value of any negotiable instrument is entitled absolutely to implement of its exact terms according to its precise tenor. A delivery order is different. If you are indorsee of a delivery order you are not in the position of the holder of a negotiable instrument like a bill; because, in the case of the delivery order, you are subject to all the exceptions arising out of the real contract between the original granter and the original grantee. One important consequence is that the original granter of the delivery order can hold the goods for the unpaid price, against any indorsee whatever, even against a *bond fide* indorsee for full value given. The only way to complete a title under a delivery order, which shall exclude any such retention by the original unpaid seller is, to go to the storekeeper and get him to acknowledge you as owner or transferee of the goods by letter as above mentioned. Before that is done, any time before that is done, the original granter of the order, if he be an unpaid seller, is entitled to go to the storekeeper and stop or countermand the order. He is entitled to say to the storekeeper—"I have not been paid my price, and I require you to retain the goods for me, and to deliver them to nobody whomsoever, neither to the original grantee nor to any subsequent indorsee from him." That, in effect, is provided for by section 2 of the Mercantile

Law Amendment Acts—"Where a purchaser of goods, who has not obtained delivery thereof, shall, after the passing of this Act, sell the same, the purchaser from him, or any other subsequent purchaser, shall be entitled to demand that delivery of the said goods shall be made to him and not to the original purchaser; and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery on payment of the price of such goods, or performance of the obligations or conditions of the contract of sale; and shall not be entitled, in any question with a subsequent purchaser or others in his right, to retain the said goods for any separate debt or obligation alleged to be due to said seller by the original purchaser; provided always that nothing in this Act contained shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid, or for performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller, except as between him and such subsequent purchaser, or any such right of retention arising from express contract with the original purchaser." That is a change on our older law. According to the common law the seller of goods, even though he had granted a delivery order, and even though he had been paid the price, was entitled to retain and stop delivery of the goods, not only for the price, but for any debt whatsoever that might be owing to him by the original purchaser; and in that way the indorsee of a delivery order, even for value, might get delivery stopped against him on debts of which he had never heard anything. This Act limits the right of retention by the seller to the price of the goods, except where the seller pawns or arrests in his own hands before the second sale is intimated; but it leaves the grantee of a delivery order, or any indorsee from him, exposed always to the risk that the seller of the goods may, at any time before the order is presented for delivery, go to the storekeeper and say—"Do not give delivery of these goods; do not accept any other person as an owner. I stored the goods, and I insist on their being retained until I shall be paid the price." Now you see that is just precisely the point where the difference between a delivery order and a proper negotiable instrument comes in. If I am indorsee of

a bill for value, I am entitled to demand the contents of the bill from the acceptor absolutely; and I do not require to inquire whether or not he is liable to the drawer. A delivery order not being a negotiable instrument, if you take a delivery order as indorsee, you take it under risk of the price not having been paid by the original grantee to the granter. If he has not been paid the price, when you go to the store with your order, you may find that he has stopped the goods and prevented you getting delivery, and that, although you may have already paid the price to the indorser to you.

There is a third point to be noticed in regard to these delivery orders, and it arises with regard to the case of a merchant who holds goods in his own store, exclusively occupied by him, or a merchant who keeps a store, into which he receives the goods of others as well as his own goods. A delivery order granted by that merchant on his own storekeeper is of no use at all as an instrument for passing the property so long as the goods are allowed to remain in the same store. If you get a delivery order from such a merchant, and even get his storekeeper to accept liability for the goods to you as the transferee, that will not transfer the property nor complete the security. This seems at first a curious result, but it is an almost necessary consequence from the common law on the subject. If the goods are in a man's own store, although he is also a public storekeeper, no purchaser can have any vested right in the goods unless he takes delivery and attains the actual possession. The storekeeper of the seller is only a servant of the seller, and any acknowledgment granted by such storekeeper does not suffice, in law, to pass the right to the purchaser. That seems rather a hard result, but it simply flows from the doctrine that, when the goods are in the possession of the seller himself and not in the hands of an independent storekeeper, the only way to complete the right of the buyer or transferee is to take delivery.

These are the principal points about delivery orders,—that you must have three parties—the granter, the grantee, and an independent storekeeper; that if the original price is not paid to the granter of the order, he may retain the goods against the grantee or indorsee from him; and that a delivery order granted by a man upon his own storekeeper, is of no avail unless you

get actual delivery. It may, however, be yet found that sections 4 and 5 of the latest of the Factors Acts, 40 and 41 Vict. c. 39, have an important effect towards giving delivery orders the privileges of negotiable instruments. These sections are—"4. Where any goods have been sold or contracted to be sold, and the vendee or any person on his behalf obtains the possession of the documents of title thereto from the vendor or his agents, any sale pledge or disposition of such goods or documents by any such vendee so in possession, or by any other person or agent entrusted by the vendee with the documents within the meaning of the principal Acts as amended by this Act, shall be as valid and effectual as if such vendee or other person were an agent or person entrusted by the vendor with the documents within the meaning of the principal Acts as amended by this Act; provided the person to whom the sale pledge or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods. 5. Where any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery or makes the goods deliverable to bearer) to a person who takes the same *bond fide*, and for valuable consideration, the last mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*."

There is a delivery order which is in vogue particularly in the west of Scotland, as being the seat of the great iron market, and of the principal Scotch iron works. The Bairds or Dixons, or other great ironmasters, grant warrants somewhat as follows:—"I will deliver so many tons of iron of a specified brand, to any person who shall lodge this document with me after such and such a date." It is a warrant granted in favour of the bearer, although the word "bearer" is not usually inserted; and it is an obligation by the granter to deliver so many tons of iron to anybody who shall lodge the warrant with him. These warrants are very much used, particularly in Glasgow, and they pass from hand to hand without indorsement. You buy so many thousand or hundred tons of

iron, and you get one of these warrants for your purchase or security; and it may pass through fifty hands before it comes to the hands of the man who actually goes to the ironmaster and takes delivery of the iron. These warrants are treated in practice as if they were negotiable instruments. Now the position of these warrants in law, according to the older authorities, is that they are not negotiable instruments. The law does not, or did not, accept or adopt them as such. The provisions of law on the matter, as held some years ago, were that no private agreement between the parties, no private and recent usage among merchants will create a negotiable instrument, or will make an instrument have the privileges of a negotiable instrument which has not that by the established law merchant or by statute. It is attempted to make these iron warrants negotiable by agreeing that anybody who holds them for value shall be entitled absolutely to delivery, and that he shall have no concern with the state of accounts between the ironmaster and the original purchaser of the warrant. The law says, or said, that is not to be allowed, and therefore these warrants stand, or stood, in no better position in law than proper delivery orders. Indeed it is doubtful if they are not in a worse position, because a proper delivery order is expressed as in favour of a certain named person, while the warrants are blank or to bearer. The old Act of 1696, c. 25, expressly forbids the using of any bonds blank in the name of the creditor or without a creditor named. You know that pound notes, payable to the bearer, are issued, which pass from hand to hand; but that is by force of special statute, and unless by statutory authority these notes to bearer would not be valid. There is, however, no special statute for these iron-warrants; and the attempt made by persons in the iron market to make such warrants pass from hand to hand as a bill was at first regarded as an illegality. In point of fact they are used, and enormous transactions depend upon their validity by the existing custom among merchants. Ironmasters, for their own interests, raise no question of their validity, and in that way these warrants are effectual. The opinion of the House of Lords, however, was that they are not in themselves valid documents. There was a case that went to the House of Lords in 1856—the case of *Dixon v. Bovill*, 3 Macq. p. 1,

where the Dixons, great ironmasters in Glasgow, raised the point that these warrants were not good, to prevent retention against the bearer or holder for the price. They said they had not been paid by the man to whom they granted the warrant, and he was bankrupt, and they pleaded against the onerous holder that the warrant was not of any avail in itself to any effect or at least to the effect of entitling him to delivery while the price was not paid. The House of Lords laid it down that these warrants were not good. The opinion they expressed was in these words of the Lord Chancellor:—"I have no hesitation in saying that, independently of the law merchant and of positive statute, within neither of which clauses do these scrip notes range themselves, the law does not, either in Scotland or in England, enable any man by a written engagement to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title." The matter stands upon that adverse opinion. It has never been actually decided that these warrants are ineffectual; indeed the opinion of the Court of Session was the other way; but this opinion of the highest Court ought, of course, to carry much weight. In this particular case the holder of the warrant was found entitled to get the goods without paying the original price; this was not in virtue of the warrant solely, but because the Dixons had written a letter in answer to an inquiry by him, in which they were held to have promised to deliver the iron. By that letter the House of Lords said the Dixons were bound; but they expressly refrained from recognising the validity of the iron warrant, and they expressly refused to hold that they could have compelled the Dixons to give delivery in virtue of the warrant itself. It is a curious state of matters, that warrants on which such enormous sums pass are, or were, of doubtful validity. I suppose in practical business you would take these warrants; but it is right you should know that there is, or was, grave doubt as to whether they are worth anything at all.

There is another matter that may be noticed in this connection just to illustrate the same view, that it is not in the power of private parties to institute at pleasure a new species of negotiable instrument. This has reference to debenture bonds

issued by a limited liability company, not by virtue of any statute, but at their own hands. The Credit Foncier of England, in 1873, issued debenture bonds payable to the bearer; one of these bonds was stolen from the original holder, and a person in good faith acquired the bond for value from the thief. Now, if the debenture bond had been a proper negotiable instrument, anybody innocently acquiring it for value would have been entitled to enforce payment against the company, and the person who lost the bond must have lost his money. That is the law as to bills. If I acquire a bill which has been lost or stolen, and if I pay value for it in good faith, I am entitled (subject to section 15 of the Act of 1856) to enforce it against the acceptor and indorsers; and the man who has lost the bill has no recourse against me. My right is perfected by *bond fide* acquisition for value of a negotiable instrument, and I am entitled absolutely to the contents,—that is the very privilege of a negotiable instrument. The Court of Queen's Bench, in the case of the *Credit Foncier of England*, 8 L. R. Q. B. 374, held that these debenture bonds were not negotiable instruments, and that therefore, the person who had paid the value to the thief, or the person who acquired from the thief in *bond fide* was not entitled to recover the money. Because it was not a proper negotiable instrument it was only the original grantee who could sue, and the assignee from the thief was in no better position than the thief. In that case the Court considered the opinion of the House of Lords about the iron warrants, and laid down expressly the startling doctrine that no private parties can, by stipulation or even by custom, confer the privileges of a negotiable instrument on any document not recognised by law as such. You require a statute, as in the case of bank pound notes, or the law merchant, as in the case of bills, to confer negotiability. This decision, however, went too far, and though the law is not yet on a satisfactory footing, later cases have shown a tendency in the Courts to accept much more readily as being negotiable modern documents which, by their terms or by recent custom, are drawn out to bearer. The result of the matter appears to be now, (1.) that general and well established usage or custom among merchants to treat documents such as scrip certificates or iron warrants as being negotiable by passing from hand to hand

will receive effect; (2.) that the granter of a document like an iron warrant prestable to bearer will be held personally barred by his own writ from setting up any claim of retention or other exception which might interfere with the exact performance of his obligation according to its terms; and that, on the like principle, the owner of scrip issued to bearer will be barred from preventing it from receiving effect, even if it has been stolen from him, provided it is in the hands of an onerous *bond fide* holder; and (3.) that probably iron warrants are also protected in the hands of an onerous and *bond fide* holder by the terms of the Factors Act above mentioned. See *Goodwin*, 1 App. Ca. 476 and *Rumball*, 2 L. R. Q. B. Div. 194.

There is another instrument we have to deal with, which is to most effects negotiable, and that is a bill of lading. That is a document granted by a ship master in whose ship goods are placed. It bears that certain goods have been shipped, and by a particular ship, and the shipmaster undertakes to deliver the same to the consignor on his order, or to a named consignee at the port of discharge. These bills of lading are much used in business as good securities for advances, and I believe particularly so by the Indian banks. A merchant shipping goods to India or Australia, goes with the bills of lading for his cargo to the bank, and he is allowed to draw against the cargo, and so gets the proceeds of the consignment at once. The bank retain the bill of lading, and send it out to their agent abroad who, in virtue of the endorsement of the bill of lading, gets the goods upon arrival of the ship. The banker does not allow the bill of lading or the goods, on arrival, to go out of his control until his advance has been repaid or provided for. It depends on the negotiability of the bill of lading that, for the great convenience of trade, the bill is as good as the cargo itself to a *bond fide* indorsee for value. If I get a bill of lading indorsed to me for value I am entitled to delivery of the goods against the unpaid seller. He is not entitled to interpose and stop delivery of the goods against the onerous indorsee. If I have a bill of lading indorsed to me for value, I am entitled to delivery of the goods just as I am entitled to payment of a bill if I get it for value, without inquiry as to the state of accounts between the original parties to the bill. There is an Act of Parliament, 18 and 19 Vict.

c. 111, which is of consequence in establishing their character as negotiable instruments; and these bills of lading are clearly distinguishable from delivery orders. Such orders, as well as iron scrip warrants and debenture bonds issued by companies without authority of an Act of Parliament, may not be negotiable instruments; but a bill of lading is in many ways like a bill of exchange. If it comes to a holder for value, he has the right of delivery against everybody, and he is not subject to the exceptions or equities that could have been pleaded as between the original parties to the bill, provided that the goods have been actually put on board so as to bind the shipowner. If I sell to a man goods for delivery in Australia, and if I am not paid the price and the purchaser is insolvent or is threatening insolvency, I can telegraph out and stop the goods before they arrive. The unpaid seller is entitled to stop the goods in the case of consignment to the purchaser abroad; but if the bill of lading has been in the meantime indorsed for value to a third party, the indorsee is entitled to demand their delivery as against the unpaid seller. That is an important effect of the bill of lading being in most respects a negotiable instrument. The principal effect of the negotiability of an instrument appears when it reaches the hands of a third party holding for value. It is good in his hands against any exception as between the original parties to it.

The next thing that we are to notice is the manner in which incorporeal moveables may be transferred. We have considered how incorporeal rights, such as debts, shares, and stocks may be transferred; and we saw that the proper way to transfer such rights was by writing. There must be an assignation in some recognised or appointed form, and that assignation must be followed by intimation to the debtor. A simple example is where A. is creditor of B., and assigns his debt to C. C. must, in the first place, get a formal written assignation to the debt, or a document which the law considers as equivalent to an assignation, and, moreover, C. will acquire no right to the debt, and he will have no right valid against third parties until he intimates the assignation to B. The intimation comes in incorporeal rights in the same place as the possession of corporeal moveables.

In regard to the transference of shares in public companies,

you know that is provided for generally by statutes, either the Companies Acts or the Railway Acts or the special Acts under which the company is constituted. Shares in banks are transferred in forms appointed by the statute or charter, and the transfer must be recorded in the bank books, subject in some banks to the approval of the proposed transferee by the directors. In regard to the shares in railways, you must not only have transfers or assignments, but you must have these registered before you have any right to the shares. But dealing with the common law rules, I say, generally, that apart from any statute you can acquire no complete right or security in incorporeal moveables unless you have both a valid writing of transference and intimation to the holder of the funds that you have the right to them. The regular form of intimation is intimation by a notary public who hands a formal notarial schedule to the debtor, with a copy of the deed of assignment. That can always be done, but that is a formal and expensive way of making intimation. The ordinary business way is that you present the assignment to the debtor, and get the holder of the assigned funds to write an acceptance of intimation; and that completes the right of the assignee. There is an Act of Parliament on the subject, not at all well framed, and it has not been much used in business, but it has some important provisions for facilitating intimations of assignments. It is 25 and 26 Vict. c. 85. Then in regard to life policies, there is an Act of Parliament, 30 and 31 Vict. c. 144, compelling insurance companies, if they are presented with an assignment, to write an acceptance of intimation upon the assignment, and hand it back to the assignee. You must understand that intimation in some form or other is always requisite to complete your right and security constituted by assignment. It will do you no good though you can say that the debtor knew quite well and had private knowledge that the assignment existed. That is of doubtful avail in Scotland, at least wherever the debtor might reasonably say that though he knew the assignment was granted, he did not know that the assignee intended to put it in force. You must have intimation to complete the assignment; and that is a thing to be kept in view, because you may be mistaken sometimes through what is represented to be the law of England. In England an

assignment does not require intimation as a solemnity, though it may be needed to prevent the holder of the funds from paying to the cedent; but in Scotland you must keep in view that no assignment gives you any right or complete security until the assignment has been formally intimated to the debtor, or until you get his acceptance of intimation.

Another thing to be noticed is that the assignee of any incorporeal moveable right, obtains no better right than his cedent. He is not like the onerous and *bond fide* indorsee of a bill or other negotiable instrument who may be entitled to enforce the bill when the indorser could not have enforced it. The bill may have been granted for the drawer's accommodation, and he may have no action against the acceptor; but if the drawer has indorsed it for value to a third party, that third party can enforce it against the acceptor. The assignee, on the other hand, has no greater right than the cedent to the debt; and the debtor is entitled to plead against the assignee all the defences he could have pleaded against the original grantor at the date of the assignment. In connection with these matters I may mention a curious point as to scrip certificates. When a limited liability company is being started, they often issue scrip showing that a man has subscribed for a certain amount of shares and has got them allotted to him. These certificates often pass from hand to hand in the open market, and the last holder alone registers as a shareholder. The person who is the original applicant for the shares, and who got them allotted to him, remains liable although he has sold the scrip, and it is in the hands of a purchaser; he remains liable to the company for calls. The only thing that will free him is that he should grant a transfer and have the shares registered in name of the purchaser as the shareholder. The necessity for completing securities over moveables by intimation, registration, or actual delivery, is evinced by the vesting clause in the Bankruptcy Act, which gives the trustee all the moveables standing in name of the bankrupt to the same effect as if the trustee had got actual delivery or possession, or had given intimation as at the date of sequestration. Where registration is required to complete the right, the trustee will be excluded by registration of the security before him even after sequestration (*Morrison*, 3rd February, 3 R. 406).

Another matter that we have to take up is that of lien over moveable property. Now a lien arises in this way—when I acquire a right over moveables not belonging to me, but in my possession; the right to hold them against the true owner. There are many liens, as of a carrier for freight, or a tradesman for his charges for work on goods. A typical case of lien arises from the pledge of moveable subjects for debt. The subjects of pledge being put into the creditor's hands, he acquires no right of property over them; he merely obtains a security over them for the amount which he has advanced. The creditor has thus a lien or right of detention, and ultimately of sale, through the pledge. There is, however, another case to be distinguished, and that is the right of retention. Retention is a much wider right than lien. It is a case where the creditor has a right of property transferred to him, and he is entitled to hold the property until he is relieved of all the obligations owing to him by the original owner. The typical case of retention arises in transference by disposition *ex facie* absolute. Thus, in the case of your transferring to me goods by a delivery order, and my getting the delivery order properly completed with the storekeeper, I have the right of property transferred to me, as by disposition *ex facie* absolute, and I can hold not only for the original debt but for any other debt whatsoever owing to me by the granter of the delivery order. You must therefore distinguish between the case of lien where there is no right of property given to the holder in the goods, and the case of retention where he has the full right of property and possession. In the latter case he is entitled to retain the goods for future advances, or for any debt whatsoever. In regard to liens, the first thing to be noticed is that you must have possession. If you have not possession of the goods you cannot have any lien. For instance, a shipbuilder making repairs on a ship in a home port has, like any other workman, a lien over the ship for his charges. He is entitled to say to the shipowner, "You shall not have this ship until you pay me for these repairs." But he can only say that so long as he retains possession. If he allows the ship to get out of his own slip to the harbour, he loses possession and his lien is gone. The same thing occurs in regard to other cases of lien. The carrier has the right of lien over goods in his hands

for the freight; but if he delivers the goods he loses his lien. No lien without possession is the general rule in every case of lien whatever. There are exceptional cases of general lien where, having possession of the goods, you may hold them for any debt owing to you by the owner. There is the case of a factor or agent. If a man is your factor or agent he is entitled to retain any of your goods he has in his hands until he is relieved of all his debts owing by you to him. For instance, a bank has a lien over its customer's funds, because the banker is, in the eyes of the law, just an agent for managing the money of his customer, and he has a general lien over his customer's funds and securities for every debt owing to him by the customer. The bank also, on the same principle, may retain the stock or dividends of their shareholders for any debt owing by their shareholders. If they have advanced money to their shareholders they may retain their dividends or their stock to meet the amount. Then a cautioner has a general right of lien against the principal debtor for his relief, whereby, if he is owing a debt to the principal debtor, he may say, "I will not pay the debt until I am relieved of my cautionry." Railways lately have been trying to establish a general lien on goods coming into their hands, for all freights or debts owing to them by the consignors, apart from the freight on the particular goods; but the Courts have steadfastly set their face against that, and it has been decided that they have no general lien over goods in their hands for general debts owing to them by the consignors; at all events they have no such lien as against an onerous consignee. They can always retain particular goods for the freight of these goods; but if goods are put into their hands here for a man, say in Aberdeen, on being paid the freight they have no right to hold these goods for their general account against the consignor, who has become insolvent. Some trades have, by custom and course of dealing, a right recognised by law to a lien over any parcel of goods in their hands, either for the general balance of their account, or for a year's account.

It is proper, however, that I should notice the case of pledge a little more particularly. The case of pledge is the case where moveables are put into a creditor's hands to meet a specific debt. What is to be noticed is, that the right of

property remains with the pledger—the person who puts the goods into the hands of his creditor. The second point to be noticed is that the creditor can only hold the pledge for the specific advance he has made. If goods are pledged expressly and definitely for £500, and further advances are made, unless the creditor takes care to stipulate that he shall be entitled to hold the pledge for those additional advances he will not be allowed to do so. The pledge can only be held for the very advances to which, by the agreement of parties, it was to be applied, and to no others. A third point is that the pledgee, the person who holds the pledge, must keep the possession, otherwise his right is gone. Now there is an important distinction to be observed here in regard to the difference between pledge and security in the form of a transference of the right of property to the creditor. There is a case of *Hamilton v. The Western Bank*, 13th December, 1856, 19 D. p. 152, which is worth noticing. The Western Bank there got what was not a pledge but an ordinary unqualified delivery order, transferring to them certain brandy in a public store. They went with that delivery order to the storekeeper, and got his acknowledgment that he held for them in the way I have mentioned. At the time they got the order they made an advance of £630 to the granter, and afterwards they advanced further sums. They were paid their first advance but not any of their advances after the transference of the brandy to their name. The bank then claimed to hold the brandy for their whole advance, and they were met by this plea—"You only got a pledge of the brandy for the £630, and you are only entitled to hold the pledge for the specific sum agreed upon when the pledge was given." On the other hand it was maintained for the bank that they had got a transference to the actual property of the goods by the delivery order, and having got that they were entitled to retain the goods for all their advances. This defence was sustained by the Court; and that shows you the distinction between pledge and getting the property transferred to the creditor, so that he may retain it for any obligation whatever, prestable by the original owner to him. The creditor does not become owner of a proper pledge and he cannot deal with the property except under judicial authority; he cannot sell the property except

under a warrant from the sheriff. In the case of property being fully transferred as by an intimated delivery order, the matter is otherwise. The creditor becomes proprietor and can hold or sell the goods for the original advance, and for any other advances. It is thus important to notice the difference between moveable securities in the form of sales, or of absolute conveyances of the property and the mere pledge of moveables. In this connection I will be pardoned for mentioning another case where a man assigned his life policy for an advance of £500. The creditor afterwards, without any new arrangement, advanced £700. The man died and his policy became payable. The creditor then insisted upon getting paid out of the proceeds, not only the £500 mentioned in the assignation in security, but also the further advance of £700 which he made afterwards. The Court, however, held that he was only entitled to draw his original £500 out of the proceeds of the policy, and that he had no right to get his whole advance out of these proceeds. He had only a limited right as of pledge, and he had not the right of property at all. That brings out clearly the distinction between a pledge where you do not get the property transferred, and a disposition *ex facie* absolute, transferring the property. In the latter form the creditor can retain for all his advances, whether made at the date of the deed or afterwards. See *National Bank v. Forbes*, 21 D. p. 86 (cf. *Merchant Bank of London*, 5 Ch. Div. 205).

I have to mention in the last place, that there is another kind of security which may be given in moveables, and that is personal security by bill, as security for the general balance to a bank. An intending trader and his friends may concur in granting a bill which shall be security for any eventual balance on the trader's current account; but this is hardly a proper use for a bill. It is presumed in law to be granted for instant value, and if it is intended to be used as security for the ultimate balance at the end of the account current, that should be made plain, and the proper way to make it plain would be for the trader and his friends to grant a letter to the bank stating that the bill was to be used as a collateral security for the ultimate balance on the account. I should imagine this is a thing not always attended to by banks in taking such security bills. They should retain evidence

that the bill is intended to be used as a security for the ultimate balance, say at the end of eighteen months, and is not to be exhausted by the repayment of the first advance once for all. They must at all events keep this bill out of the general account. Suppose you have got a bill of that sort as security for the balance on an account, you are not entitled to charge on the bill for the amount of the bill *de plano*. The bank is only entitled to sue for the amount of the balance as debited on their account. A bank may have a security bill for £2000; that occurred in a case where the whole advance was only £300. The bank cannot *de plano* rank for the whole £2000 on the estate of the debtor or of his friends. The bank, holding such a security bill, can only rank for the balance actually advanced, as the same may be vouched by the account. In connection with that matter there is the important doctrine, often forgotten by men of business, which is laid down, in accordance with the English authorities on the same subject, in the case of *Lang v. Brown*, 22 Dunlop, p. 113. It is this, that a bill once entered in current account to the debit of the customer is held as paid by the first sum or sums to the same amount, which may appear in due course on the other side of the account. If the original advance was £500, and the customer has paid back one way or another from time to time enough to meet this advance, he may, nevertheless, at the end of the account, be found to be indebted to the bank in, say, a thousand pounds. It may sometimes be convenient in such a case for the bank to go back on the account and hold the original bill for the original advance of £500 as still subsisting, so as to recover from the debtor the balance of the account so far as possible, and at the same time to hold the other parties to the original bill for £500 still liable to that amount. The law which is laid down in the case of *Lang v. Brown*, however, forbids any such remodelling of the account current. The doctrine is—"If there is no appropriation by either party, and there is a current account between them, as between banker and customer, the law makes an appropriation according to the order of the items of the account, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side." In the case of *Lang v. Brown*, the law agent

who was acting as a private banker for his client, got a bill from his client with the names of two friends upon it. He discounted that bill and had to retire it at the bank, and he debited the amount of the bill when he retired it to his client in their account. This debit was on 10th May, 1849, and after that there were several payments made by the debtor, sufficient, if taken exactly in their order, to extinguish all claim by the law agent on this particular bill. The balance at the close of the account was much more than the amount of the bill against the client. The bill was for £100, and the balance was for something like a thousand pounds to the debit of the client. The agent wanted to use the bill which he had debited on 10th May, 1849, as still subsisting against the friends whose names were upon the bill. It was a security bill, and if he had kept it out of the account he might have been able to use it as against the parties upon it. The Court ruled that as he had debited the bill when he retired it to the client on 10th May, 1849, the subsequent receipts from the client must be applied in their order to meet that debit, and although the balance at the end of the account was against the debtor, nevertheless that bill was held to be discharged. That is a very important rule for all cases of current accounts, which I do not think is well understood by mercantile men in general. In two late cases, where the bill was kept out of the general account, and so did not fall within this rule, the bank's averment that they held the bill as security for the ultimate balance on the account, could only be disproved by the writ or oath of the bankers (*Glen v. National Bank*, 14th December, 1849, 12 D. 353; *City Bank v. Jackson*, 12th May, 1869, 7 M. 757). These decisions do not appear to be satisfactory; and it seems that the specific appropriation of a bill to a particular purpose—such as to secure a special advance—should be proveable by proof at large against the claim of the banker to hold the bill under his lien or as a floating security for the ultimate balance. They suggest that, to avoid disputes, the purpose with which a security bill is handed to the banker should always be expressed in writing.

LECTURE VI.

PRINCIPAL AND AGENT.

THE subject of our lecture on this occasion is Principal and Agent. That is the usual term employed to denote a great variety of relations where one person acts for another under a contract, express or implied. One technical term, with which we need not trouble ourselves, is that of "mandant" and "mandatory." "Mandant" is the technical term for the principal; "mandatory" is the technical name for the agent—the person who holds a mandate. Some specialities arise with which we need not trouble ourselves, as in the case of gratuitous mandates, under which a person acts without fee or reward; and another case, where one friend takes it upon himself to act for another in his absence, which is the quasi-contract of *negotiorum gestio*. We confine our attention to principal and agent on the ordinary footing—that of being paid as by commission. That is a legal relation involving a great number of varieties. We have it from the very lowest up to the highest—from the case of the housekeeper who buys in a man's provisions upwards to the shipmaster who is agent for the owners of the ship when abroad, the broker who buys and sells on commission, the factor or commission agent who holds goods and disposes of them, the law agent who transacts a man's law business, the bank agent who manages affairs for a banking company, and the banker himself, who is in one aspect just an agent for taking charge of his customers' money. All these cases, and various others which might be named, fall under the general relation of principal and agent—the case of a person agreeing to act for another in some department of his affairs. With regard to the person who may act for another, there is a peculiarity to be noticed; that some persons, such as a minor, a person not of full age, a married

woman who is under the power of her husband, and others who are under legal disabilities when contracting for themselves, may all be agents on the principle that a man in full possession of his rights may choose any person he pleases to be his agent; and that constitutes a peculiarity of the relation. But we are to deal with the more salient points of this relation, which is a wide, extensive relation, including not only the cases I have mentioned but also that of co-partners; for a partner in relation to the public is neither more nor less than an agent for the firm, and is governed by the rules of agency.

The first general point I think it desirable to bring under your notice is the difference between general and special agents. General agents are those who act for a man in all his affairs in any particular line of business. Thus, for instance, a factor or agent who manages all a merchant's consignments leaving Glasgow, Liverpool, or Leith, is a general agent; and in the same way, a person abroad at Calcutta or Rangoon who manages all the consignments of English goods sent abroad by a merchant here, is a general agent in the particular line of business entrusted to him. On the other hand there are special agents, parties employed to negotiate in a special matter, a particular bill, or in any one particular affair. With regard to special as distinguished from general agents, the thing of chief importance for us to observe is the different rules as to the care which third parties transacting with them must observe as to the powers which these agents respectively have. Thus, with regard to a special agent, a man who simply is employed to act in one particular affair, who comes before you to act in that one matter, it is to be understood that in dealing with him you must ascertain exactly the terms of his commission. You must see the special powers with which he is invested; for if he oversteps these powers he will not bind the principal, and any transaction he may engage in will be binding on nobody but himself. With regard to the general agent, a person authorised to act in a man's general line of affairs, the practical consideration is that you are safe in trusting him in all matters within his functions, according to the usage of his particular trade. His principal is supposed to hold him out to the public as authorised, with regard to his particular line of

business, to do all that is necessary for his principal's interest. Therefore the distinction between special and general agents just comes to be a warning to all to observe this—that, if you are dealing with a special agent whom you never had dealings with before, and never knew before, as agent for this particular principal, you must be careful to see the terms of his commission, in order to be sure that what he proposes to do is within the powers given to him. On the other hand, in transacting with a man who has been dealing for some time as general agent, you are safe to deal within the ordinary limits of such an agent's powers. You will be safe to do so without demanding a sight of his power of attorney or procuration, or whatever written authority he may have. You are safe, on the principle that the person behind him has authorised him to do what is usual and necessary for the conduct of his principal's business within the proper limits of his trade. As a safe practical rule, it may be said, however, that a general agent has no implied power to borrow, though a partner may borrow when necessary to meet an emergency in the business of his firm (see *Sinclair, Morehead, & Co.*, 4th June 1880, 7 R. 874).

In dealing with the powers of an agent, as implied by his position to the outside public, I may bring under your notice the general principle of all mercantile transactions—that a person who permits another to appear as his agent before the public is bound by all the usual and necessary acts of the agent, according to the customs of the trade. The authority which the principal has apparently, by his own act, bestowed on the agent will bind the principal, without prejudice to third parties taking benefit from any higher authority which may have been privately conferred by the principal or his agent. It is not necessary for the agent to have a written document; it is only necessary to show that the man has been allowed to act in general as an agent for the principal, and thereupon the principal shall be liable to the full extent of the powers usually conferred on such parties in the trade. That is called by English lawyers the principle of "holding-out." If you hold out a party so as to lead others to believe that he is your agent, you are responsible for him, even though he have no power at all. That is the chief matter to be noticed

with regard to special and general agents. Your only safeguard is to demand a sight of the mandate or power under which the special agent professes to act; but a general agent has full powers according to his ostensible authority. The general principle of this relation leads to further rules, which are to be kept in view. Principal and agent is, above all, a personal and fiduciary relation. With regard to the personal nature of the relation, if I appoint a man as my law agent, I have chosen him because I have confidence in him; I have chosen him for his personal qualities, or his personal intelligence, of which I desire to get the advantage. The consequence of that is, that the agent appointed by me must act himself personally; he cannot act by substitute. He has promised to me his personal skill and intelligence, and the powers I give him as my agent are confined to him and him alone. That first rule of agency is expressed in the familiar maxim, *delegatus non potest delegare*. A person with delegated authority cannot delegate that authority to anybody else; he must do what he is commissioned to do himself, and through no other person. But that rule must be taken reasonably. If I employ a law agent to attend to my affairs, and to see to a sale of my furniture by public roup, I am not to expect that he is not to employ an auctioneer in the usual way. He is entitled to take the usual assistance. So, too, an architect may employ a surveyor or measurer, who must be paid by the architect's employer (*Black*, 24th January, 1879, 6 R. 581); but within the proper limits of his agency the agent himself must act, and no other.

Another general feature to which I wish to call your attention at the very outset with regard to this matter of principal and agent is its fiduciary character. It is a relation of confidence. The principal entrusts his interests to the care of his agent, and his agent is held to promise to give his best exertions for his principal's interests, and not to seek his own profit at all beyond the commission or salary that has been stipulated. The principle is stated in various ways, but it is just this, and the law enforces it most rigidly—that the agent in no case is allowed to put his own interest in conflict with his duty to his employer. He is entitled to his commission, to his salary, to his stipulated reward, of whatever sort it may be, from his

principal ; but when he gets that he is not entitled to another penny of profit on any transaction which he enters into on his principal's behalf. That is an important and far-reaching principle, and one that I know many of my mercantile friends are not sufficiently aware of ; and I propose to illustrate it by showing its application in one or two cases. Thus, for instance, I employ an agent, and in the course of his business for me he pays my accounts. Well, if he gets any discounts in paying these accounts, he is not entitled to retain these discounts ; he must give me the benefit of them in his accounting with me. That is one thing quite certain. In another case, supposing I employ an agent to purchase for me any articles, let it be a ship, a house, or anything, it is not an uncommon practice that the agent employed to buy goods, goes to the seller and arranges that the seller shall allow him to get something off the order for bringing it to him. That is utterly illegal, and the agent will be compelled, on the principal discovering it, to give up that profit. That was illustrated in an important case which occurred some years ago, in the Court of Session. Pender and some friends had entered into a contract for buying some ships ; and Henderson, one of the friends, was employed on behalf of the joint-adventurers to buy the ships to the best advantage. He was to get a commission of one per cent. from the others, the syndicate as we may call them, for his trouble in buying the ships. What he did was this. He went to the shipbuilders and arranged that they should pay him a commission for bringing the order, which was, of course, added to the price. In this way he obtained large commissions from the shipbuilders on some of the ships ; but his friends discovered his secret dealings with the shipbuilders, and he was forced to account for and pay back these commissions to the syndicate by whom he was employed. The principle was that an agent shall not be entitled to profit on a transaction for his principal beyond the commission agreed upon between him and the principal. See *Pender*, 20th July, 1864, 2 M. 1428. There is a still stronger case of that sort which I wish to bring before you. This is the case of an agent employed to sell. A principal has said to his agent—"Here are certain stocks to sell, or here are certain goods I want sold." Well, that agent's

duty to his employer is to make the best of these goods or stocks for his employer's interest ; and if he were to buy these goods himself, or to join with his friends in buying them, that sale would not stand. The principal, on coming to know of it, is entitled to say—"I will have back these goods." Not only will the sale not stand in a question with the principal, but the principal is entitled to go further, and say, if the agent has made a profit by a re-sale—"I shall take back the goods, or I shall simply debit you with the profit on the re-sale." I want to impress these things on you, because I know how much they are forgotten, and how hardly they seem to operate in particular cases, although it is impossible to dispute the justice and soundness of the general policy which forbids the agent from making any profit beyond his stipulated reward in transactions for his principal. That prohibition is, without exception, as to agents of all kinds. The same thing applies equally with regard to an agent employed to buy. Supposing a principal tells his agent that he wants him to buy certain things, ships, stocks, or anything you please, if that agent sells to his principal without letting him know that the agent is the seller, and getting his express consent, then that sale will not stand. The principal is entitled to say—"I shall not have the goods, though you have entered them to me and sold them to me ; or I shall take the profit you may have made in selling these goods to me." These are very strict rules. The latter rule was well illustrated in a case which occurred, about the purchase of shares, the other day in the English Courts. Certain directors of a public company wished to buy all the shares they could lay their hands upon, with the view of re-constituting the company ; and a man came forward who offered, as their agent, to get them a certain number of these shares at £3 a-share. The directors employed him, upon commission, as their agent, to make the purchase. Now, this man who had come to the directors had really bought the shares at £2 a-share ; but he transferred them to the company at £3. On the matter being found out, the principle of law that I tell you of was held to apply. The directors were found entitled to say to their agent, "You shall not make this advantage out of us ; you are to get your commission, and we shall have payment of the profit you have made—the difference between £2 and £3 a-share." Another illustration of

the same subject shows how the ruling principle of agency is applied to the directors of a joint-stock company as agents or trustees thereof. In the case of the *Huntington Copper Company*, 12th January, 1877 (4 R. 294), a gentleman of influence and position in the West of Scotland was asked to aid as director in getting up a company to purchase certain mines in Canada. The sellers of the mine, said in substance to him, "If you get a company started to purchase and carry on these mines we shall give you £10,000 of the price; you shall have that free for your share if you get a company started." Assisted by the influence of this gentleman's name on the list of directors, a company was started, the price was paid; and he got his promised £10,000 from the sellers out of the purchase-money. The company on this transaction being found out sued him for repayment of this £10,000 on the principle I speak of. They pleaded, "You, sir, were simply the agent for the company, and ought to have made the best bargain you could in its interest, and were not entitled to a profit of £10,000, or of tenpence, on the transaction, and you must hand back that money." The Court, without difficulty, held that that was the true state of the matter. I shall just read you a few sentences from the judgment stating this doctrine which I wish to impress upon you. "It is the simple and familiar rule of trust law that a trustee" (the same as an agent) "shall not, without the knowledge and consent of his constituent, make profit of his office, or take any personal benefit from his execution of it. It is not a different rule, but merely a development and instance of the same rule, that a trustee shall not be permitted to do anything which involves or may involve a conflict between his personal interest and his trust duty." You see the doctrine is this, that if an agent is employed to buy or sell or do anything for his principal he is allowed his commission out of the transaction, the agreed upon reward; but he is not by secret stipulations to make any other profit whatever, and, if he does, the principal has the right to set aside the bargain or to demand that the agent shall hand the profit over to him. "When an agent," says Lord Young, "or other trustee takes money from a person with whom he contracts for his constituent, the law assumes that he takes it at the cost of his constituent, and admits of no evidence to the

contrary. To hold otherwise would greatly defeat the whole-some object of the rule, by exposing those who sought a remedy under it to litigation about values, to determine whether or not abatements, for the trustee's personal gratification, had been made from fair prices and fair profits, and so really at the sacrifice, by the third parties, of what they were reasonably entitled to for their goods or services, without real injury to the constituent who got his money's worth. The law avoids all this by holding firmly to the rule, that a trustee or agent shall have no benefits except what the law allows or his constituent knowingly agrees to, and that if he receives more he receives it unfairly, at his constituent's expense." That, gentlemen, is the law of principal and agent—that an agent should in no case be permitted to allow his own interest to conflict with his duty to his client, which is to secure the highest possible profit for his client and nobody else; and you see how strictly it is enforced. There is no question of whether the thing was fair, nor of whether he paid too much for the goods in buying and selling: the whole question is, was the arrangement made secretly, and without the principal's express authority; and, if that is so, the agent must give up the profit, or the principal may set aside the transaction altogether. "Whenever it can be shown that the trustee has so arranged matters as to obtain an advantage, whether in money or money's worth, to himself personally, through the execution of his trust, he will not be permitted to retain it, but be compelled to make it over to his constituent."

There is one class of agents with regard to whom the law has looked very strictly on their dealings. It is only proper, as an illustration of the same principle, that I mention what the rule is, for instance, with regard to law agents who are allowed to recover fees according to a settled scale, as fixed by taxation before the auditor. With regard to such agents, as they stand in a most intimate and confidential relation to their clients, the rule is laid down that they can not legally even take a gift from the client, pending the relation, and without neutral advice and assistance for the client. They are allowed to make out their accounts according to the proper scale fixed by the auditor; but if they attempt to take a gift, that will not stand if the client chooses to challenge

it. In the case of *Anstruther* there is a very strong illustration of this rule (31st January, 1856, 18 D. 405). The client had wanted a loan of £2300, and he arranged with his agent to borrow a large sum of money, some £7000, of which £3700 was to go in paying the agent's accounts, and £1000 was to go as a gift to the agent. That was challenged on the rule I am speaking of—that the law will not allow an agent to take profit apart from the stipulated reward, and this promised gift was set aside by the Court. One of the judges says here, for instance—"I am therefore of opinion that, in this country, a gift from a client to an agent, pending the subsistence of the relation, cannot be maintained; it is absolutely void. I say absolutely, independent of, and excluding all inquiry; for it is plain, that were it not so, but modified so as to make the invalidity depend on the circumstances of the case, the object of protecting the client from the influence of the agent would, in all probability, be to a great extent defeated, and the client's interest would be sacrificed in those very instances where he had been most unscrupulously dealt with, but where the expertness and management of the agent had enabled him effectually to secure the injustice of the transaction from detection." "Whatever mischief," says Lord Eldon, "may arise in particular cases, the law, with the view of preventing further mischief, says attorneys shall take no benefit derived under such circumstances." That is simply an illustration or extension of the general rule that an agent, whether he be mercantile or law agent, is bound to look after his client or principal's interest and those alone, and to get the stipulated reward and no other. Of course this special rule about gifts to law agents not being good does not apply to the ordinary case of a mercantile agent. This is a special rule with regard to law agents arising from the great confidence reposed in them. For the protection of clients, agents shall not be allowed, while they remain agents, to take a gift: they shall be satisfied with their account, and shall take nothing more. After the relation of agent and client ceases, the client may do what she or he pleases, provided that the benefit to the former agent was given with proper neutral advice and assistance. In regard to wills the rule is that no law agent should ever draw a will by

a client in his own favour. If such a will is to be made, its preparation should be committed to the responsibility and advice of another and independent law agent. Where an agent does make a will in his own favour, the presumption of law is strong against its validity. Such a will cannot stand unless the agent is able to prove (and the onus is thrown upon him) that it was made fairly after full deliberation, and entirely free from any undue influence on the part of the agent. The like rules, requiring the utmost fairness and full disclosure of the agent's interest, apply to a purchase by the agent from the client (*Cleland*, 9th November, 1878, 6 R. 156; *M'Pherson v. Watt*, 3 App. Ca. 254). You see the principle of this law is just what I again enforce at the risk of some repetition, namely, that the agent is strictly tied down by the law, when he undertakes his principal's work, to attend to that work and to make nothing from it beyond what the principal has fairly agreed with him to give. These are the general principles that I wish to bring under your notice with regard to the relation of principal and agent; and we shall now proceed to consider more particularly the modes in which the relation of principal and agent may be constituted.

That may be done in various forms: it may be done expressly, or it may be done by implication. You may have a power of attorney, which is a formal deed granted frequently for the management of affairs abroad, or by a person abroad for the management of his affairs here. Another well-known deed is the factory and commission. It is the deed which is granted generally by a landed proprietor, who is perhaps leaving Scotland and committing the charge of his estate to some friend, or to his confidential law agent. That is a very common deed which, I have no doubt, you will meet with in practice. But these are not the only forms of constituting the relation. You may have less formal writings; you may have letters of mandate, powers of procurator, indeed any kind of writing which confers authority to act in the affairs of another. There is no special form fixed by law for the conferring of such authority; the authority may be given even verbally as to most matters. Perhaps in regard to dealings with heritable estate an exception must be made; and it would be well to keep in view that to appoint a man to

act as agent for the sale, purchase, or letting, or drawing of rents, of heritable property it is most likely that writing is required, though opinions to the contrary have been expressed. But in all other matters you may either have express authority conferred in writing by a formal deed or informal letter, or you may have it conferred by parole—by word of mouth. You may also have the power conferred by implication. The implication will arise where a man is put into a shop as manager or shopkeeper, or where a person is permitted to take charge of an office or business. The fact of a man being put in charge, and remaining in charge, and having possession of the goods and documents, will be enough to constitute the relation of principal and agent by implication; it will be enough to signify to the public that the man is held out as the agent, and thereupon all the usual powers will follow.

I desire next to draw your attention to one particular form—that of a procuratory to draw, accept, or endorse bills. That is a form which will frequently come before you in practice; and it is desirable that we examine it a little more minutely. With regard to procuration, it may be constituted in one of three modes, and first by procuration proper, which is by regular written mandate or procuratory, addressed to the agent, expressly saying, in so many words, “I, A B, constitute you my procurator or mandatory to draw, accept, or endorse bills for me in the course of my business.” That is the regular and proper form of a mandate of procuration. Besides that, you may have also the case of procuration being sufficient from the position in which a man is placed; from the fact, say, of his being at the head of a business where that power is necessary to the conducting of the business. That is a state of things which sometimes happens, of which an illustration is to be found in the case of *Edmunds v. Bushell and Jones*, on 4th November, 1865 (1 L. R. Q. B. 98). In that case, a man named Jones established a firm called Bushell & Co. Mr. Bushell, though not a partner in the business, was employed to manage the business in London; and this Mr. Bushell, at his own hand, and against the orders of Jones, accepted various bills, one of which was discounted at the Birmingham and Midland Bank. On the bank presenting that bill for payment by Jones, Jones said—“I never gave Bushell authority

to accept this bill; indeed I told him not to accept bills; and I dismissed him as soon as I found out that he had done so." But Bushell had been held out to the public as the actual manager of the business though he was not a partner in it, Jones being the only principal in business; and it was held by the Court that Jones must be liable owing to the position into which he had put Bushell. "The case," said Chief-Justice Cockburn, "falls within the well-established principle, that if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority. It is clear, therefore, that Bushell must be taken to have had authority to do whatever was necessary as incidental to carrying on the business; and to draw and accept bills of exchange is incidental to it, and Bushell cannot be divested of the apparent authority as against third persons by a secret reservation. I think Jones was properly held to be liable on the bill." You see that is a case where a man was entitled to draw or accept bills by procuration simply from the fact of being held out to the world as the manager of a particular business. But as a general rule you must observe that a mere mandate to act as a managing clerk, and to pay or discharge debts, does not amount to a procuration for bills. If all that you can find in support of a bill accepted by procuration is that the person had a mandate to carry on a special part of the business or to discharge debts that will not be sufficient. The man must be in such a position that, according to the ordinary exigencies of trade, it is absolutely necessary he should have the power of drawing and accepting bills in order to the business being carried on. Short of that, the principal will not be liable. Another case where the procuration by implication will be effectual is where there is a course of dealing by the principal recognising the acts of his agent relative to bills. If the agent has not really a mandate to accept bills but has assumed the power; if he has been in the habit of doing so for some time; and if his bills have been paid or passed in his accounts by the principal,—if such a case can be established then the procuration will be held good even though there may be no written mandate at all. The like principle applies in many various ways. It is even held to apply to bills on which the name of the principal has been

written by another person. You know that among ignorant people there is nothing more common than that one man signs the name of another at his request. If a succession of such bills have been presented in the course of business and been paid by the man whose name they bear, though his signatures has been written by another, any subsequent bill, to which that name has been in the same way written, and without anything to put the receiver on his guard against a change of circumstances, may be held effectual against the principal by virtue of the course of dealing previously followed by him without objection. That is just another illustration of the principle of holding out. If a person allows another to act in his affairs without objection as if he had the power of binding the principal, the principal will be held bound; and it is in vain for him to say that he never meant the man should have that power. The answer will justly be, Sir, you have allowed that to go on for some time; other people have acted on the faith of that, and you are now precluded from saying the man is not your procurator. There are thus three different ways in which you may have power of procuration as to bills binding the principal:—First, where there is a written mandate or letter of procuratory; second, where the position in which the agent is placed is such that he should have power to draw bills according to the usual course of trade; and third, where there is a course of dealing under which the principal has habitually acknowledged the signature and paid bills to the banks or persons who have discounted the same for the agent. This last mode of conferring implied power of procuration to draw, accept, or endorse bills has been stretched in some cases to establish “adoption” of a forged bill by mere silence of the person whose name was forged when called upon to pay. The reversal by the House of Lords, on 11th February, 1881, of *M’Kenzie v. The British Linen Co.*, 4th June, 1880, 7 R. 836, now settles that such mere silence will not infer adoption. Before a man can be held liable for the unauthorised use of his signature, there must be some active step sufficient to show that the person whose name has been forged has, after knowledge of the forgery, wilfully held himself out as accepting liability for the forged document. The only remark to be made in the fourth place

as to procuration to draw, accept, or endorse bills, is that a bill drawn, accepted, and endorsed per procuration—"per pro," as the usual contraction is—is a warning to everybody taking it that it is drawn or endorsed by a person having limited power for special purposes, and it is a warning to everybody to see that the bill is being used for the special purposes to which the procurator had a right to apply it. The receiver of the bill must see that the procurator is not applying it for other uses, as, for instance, he is not entitled to assume that because the procurator has power to grant ordinary bills, therefore he may borrow money, or grant accommodation bills. I must say that the English Courts seem to me to have extended that doctrine against banks very severely from what I observe in a case lately, in 1862, *Stagg v. Elliott*, 31 L. J., C. P. 260. In that case a father had armed his son with a power of procuration for the management of his business, and the son frequently accepted bills "per pro" for his father, but one particular bill which he accepted "per pro" for his father was for his own accommodation, and he put the money into his own pocket, and did not apply it to his father's business. The bank which discounted the bill for the agent, and held as onerous indorsee, sued the father; but the defence, which was sustained by the Court, was this:—True, I gave a procuration to my son, but it was simply that he might grant bills for the purposes of my business. This was a bill, although you did not know it, which was drawn for my son's own accommodation, and I am not liable for it. The Court held that the bank had no recourse against the father, Mr. Justice Byles observing—"The words 'per pro' are an express statement by the person using them that he acts under a limited authority, and a person taking a bill so accepted, takes it at his peril. This mode of signature is recognised by mercantile persons, both in this country and elsewhere, as the legitimate way of informing a person that a bill is accepted by virtue of a special authority." That is, at first sight, a hard decision. It shows that the signature "per pro" is a warning that the bill is granted under limited authority, and that the receiver of a bill so signed is bound for his own safety to see it is granted strictly within the agent's powers. I do not see how the bank could have practically protected itself, or have found out how the money was to be applied in this particular

case. A recent decision by the Court of Session in a case of the Union Bank was more favourable to the bankers. I refer to the case of the *Union Bank v. Makin & Sons*, 7th March, 1873, 11 M. 499, where an English firm in Sheffield had appointed an agent in Glasgow with power to manage business there for them, and in particular had accredited him by a letter of procuration to the Union Bank in these terms:—"Mr. Samuel Dempster, our manager in Scotland, whose signature is subjoined, has authority to sign, per procuration of our firm, all bills, cheques, cash orders, and other documents necessary to the conducting of our business, and all vouchers so subscribed will be equally binding as if signed by any member of our firm." You see it is a procuration to sign bills limited to those "necessary to the conducting of our business." Well, what this agent did was this—He forged the signatures of three or four parties with whom the firm had had dealings before. He had plenty of genuine bills properly signed, but he went to the bank with bills having forged on them the acceptances of various firms with which he or his firm were in the habit of dealing, and he indorsed these bills "per pro" Makin & Sons as drawers. He got these bills discounted at the Union Bank, the bankers having, of course, no knowledge that they were forged. They had no suspicion of anything being wrong; they discounted the bills as in ordinary course and in good faith. This man put the proceeds into his pocket and absconded. Then the question was, who was to bear the loss? The Union Bank claimed from Makin & Sons, the principals of Dempster. They pleaded on the principle of that English case, that the claim against them was not good. They said that the procuration was only for the purposes of their business, and that Dempster, according to the banker's own admission, signed these bills "per pro" for his own purposes, and then made away with the money. Therefore, they maintained they were not liable. The Court of Session, however, decided that the bank was entitled to recover from Makin & Sons, as the principals. They held that it was no fault of the bank that the money was misappropriated; that the bank had not failed in any duty as to seeing how the money was applied; and as it was not to blame, and had exercised all reasonable care, and had no warning that the money was not for the purposes of the business of Makin & Sons, that firm

was held liable. One of the judges put the matter thus—
“There was nothing here to awaken even a suspicion on the part of the bank. The power to deceive and defraud the bank was given to Dempster by the defenders. He used that power, and deceived and defrauded the bank. Some one must be a loser by the deceit. He who armed the deceiver with the power of deceiving ought to suffer rather than he who was deceived. Makin & Sons were cheated by Dempster, but they, of their own accord, trusted and authorised Dempster. The bank only trusted Dempster because Makin & Sons authorised and accredited him to the bank. No authority has been adduced to shake the clear principle of equity in respect of which liability for the loss attaches to the defenders, who gave to Dempster the power and authority under which he, acting for the defenders, defrauded the bank.” We may hold that case settles the doctrine in Scotland, in which the protection of third parties against private limitations of ostensible authority has always been wider than in England. But it is to be taken, you see, with the qualification and warning that bankers have to observe—namely, that although the principal who has granted the letter of procuration is not to be allowed to get off absolutely because the bill was not applied to the purposes of his business, it lies upon the bank to exercise all practically possible reasonable care to guard against the agent abusing his powers. It would have been a defence to the principal if he could have replied to the bank—“You acted carelessly in discounting this bill; you ought to have seen, or to have suspected, that it had nothing to do with my business; and, as you have acted carelessly, I shall not be liable for it.” So that you see the practical result of this decision is that, in dealing with procurations, it is necessary for bankers to take reasonable care that a procuration is not being used by an agent beyond his powers or for his own purposes, apart from the business of his principal.

The next matter I wish to bring under your notice is that of the powers which an agent has generally in the conduct of his business. The powers of an agent acting in commercial affairs for a principal are in a great measure defined by usage. As between the principal and the agent themselves there may be written instructions binding him not to do particular acts,

and directing him to follow only a certain course. But in questions with third parties, if a man is once held out as in the position of a general agent, the rule is that anybody dealing with him without notice of special limitations, according to the ordinary course of business, and in the manner fixed by commercial usage, will be quite safe. The agent may, in point of fact be transgressing the secret instructions of his principal; but, nevertheless, if he is acting in the usual manner, in ordinary business affairs, he will be able to bind his principal to third parties ignorant of his special instructions. Usage, however, has defined the powers of many agents, and with regard to one or two of these it is worth while making some remarks. An auctioneer, for instance, is an agent to sell. Well, by custom, an auctioneer is not entitled to sell on credit; and if he sells on credit he makes himself personally responsible for the money unless he is expressly allowed by the principal to give credit. That is one of the rules of usage; and generally dealings for credit are more narrowly looked at than dealings for cash. A commercial traveller employed to take orders and collect accounts is not, in the general case, held to have power to give credit by taking bills (*Cameron*, 24th January, 1871). Another similar rule as to small matters is, that in the ordinary case of a man's housekeeper buying from a butcher or grocer, the butcher or grocer is not entitled to sell on credit unless he can show that the master has been in the habit of running up accounts. If the master has, in point of fact, kept the housekeeper in funds to get goods, and has never authorised the contraction of debt, a tradesman is not entitled to recover from the master. I only mention this as an example of how usage makes rules. A shipmaster, again, has power to order necessary repairs, or he can contract accounts for necessaries on the responsibility of the shipowners if he and his ship are away in a foreign port. He can for such necessaries grant a bond of bottomry over the ship whereby he obliges the owners of the ship to pay the money if the ship arrive safely, but if it do not the owners are free from the obligation. But one thing he cannot do effectually is to bind his owners by any bill drawn or granted by him for them. No such bill binds the owners as in an ordinary bill debt. It will be necessary for the person holding it to show that it was

granted for necessities or for repairs on the ship abroad, in a case of emergency, and unless it was so granted the holder cannot recover. Nor can a shipmaster bind his owner for delivery of goods, according to bill of lading, unless they have been actually shipped, and the bill of lading is conclusive, as to the shipment having really taken place, only against the master himself (18 & 19 Vict. cap. 111). These are limits imposed by custom on a most important class of agents. Then with regard to the power to borrow, that is a power almost never given to an agent, and hardly, if ever, implied to any agent except the partner of a firm. The manager of a business, for instance, is not held to have power to borrow in the sense of taking advances against payments becoming due to the principal. For instance, lately the State Line Steamship Company in Glasgow appointed a manager to conduct all their business, and to uplift freights. He appointed, at a particular port, a sub-agent, who collected the freights there, and transmitted them; and he got into the habit of drawing on that account before the freights came in—that is to say, he took advances, or borrowed from the sub-agent, on the freights before they were payable. This manager became bankrupt, and the unfortunate sub-agent had to retire the bills, which he had granted to the manager in advance on the freights. In accounting with the company the sub-agent wanted to set these bills against the freights as they came into his hands; but it was held that the powers granted by the principal did not authorise the agent or manager to borrow on the credit of the freights, and that these bills of the sub-agent could not come against the freights; in short, that he must pay over the freights as he received them, and meet the bills out of his own funds. That is a strong illustration as to the limits of the agent's powers—that he is to do nothing out of the ordinary run of commercial usage, such as borrowing or taking advances, and that persons who aid him in doing so have no recourse on the principal (see *Ross, Skolfeld, & Co.*, 17th November, 1875, 3 R. 134, and also *Sinclair, Moorhead, & Co.*, *supra*).

With regard to the duties which an agent owes to his principal, we must notice the case of skilled agents. For instance, a law agent promises the exercise of proper skill in the performance of his duties. If he fails in that he is

liable to damages. If he, from want of proper skill or care passes a bad title, and the bond which he takes over a property is in consequence lost, he will be responsible for the amount of the bond. Every skilled agent who is employed warrants that he possesses and will use a due amount of skill in the transaction of the affairs which he has undertaken; and it is the like with other agents. All other agents, whether skilled or not, promise to their principals to give reasonable care and attention to his affairs. If they fail in that they will be held liable in damages. That is all the more the case when an agent is acting for reward, and being paid; but it will apply also to a person who is doing anything as an agent gratuitously. For instance, if a friend undertakes to do a thing without fee or reward, but simply on account of friendship, for me, I am entitled to rely on reasonable care in what he undertakes, and, if he fails, he will be liable to me for damages. Just the other day a case of this kind occurred. A merchant was to get delivery of some goods. The seller was not able to deliver them immediately, but promised that he would send them. A friend of the buyer undertook to obtain from the seller certain other goods to be held as security for due completion of the original bargain; but he omitted to take delivery of these security goods in such a way as to put them legally in his own power; and they were taken away by the seller. The seller became bankrupt, and the buyer, who had not promised to give a farthing to his friend for looking after his security, was held entitled to recover damages from his friend for neglecting to take the ordinary precautions of business; so that the undertaking of an obligation for a friend involves in it reasonable care, and any breach of that will justify an action of damages. One of the duties of an agent is to keep proper books and hold count and reckoning with his principal at proper times. If he fails to do that he may even lose his commission. That is an obvious enough matter, and I need not enforce it on you. When a man gives instructions to his agents to insure his goods, or when it is the usual and proper course to insure, it is the agent's duty to do so; and if the agent fails to insure the goods, he will be responsible for any loss, as if he were himself the insurer. It is not in general a good defence to an agent who

has failed in his plain duty, that if even he had done what it was his business to do, the final loss to the principal would not have been prevented. The principal is entitled to reply that the agent contracted to do this for him; and the agent will not be heard to say, it would have done no good. The principal is in right to say—"You were bound as an ordinary branch of your duty to do a certain thing, and I was entitled to get my chance of the profit that might accrue to me from it." If an agent, by overstepping the bounds of his commission, has made his principal liable to third parties, the agent will be bound to relieve his principal of all loss or damage that may be sustained by his going beyond his powers. So that you see the law looks broadly, carefully, and strictly after the duties of an agent, holding him liable in reasonable care and proper skill, and making him liable in damages in case of failure.

As to the rights of an agent, of course he is entitled to get his commission or other stipulated reward. Moreover, he is entitled to be relieved entirely by his principal of any expense he may have properly incurred in the conduct of the agency, and of any obligations that he may have undertaken on behalf of the principal. All these things the principal is bound to do: that naturally follows from the nature of the undertaking. If an agent is to look after a man's affairs, he is entitled to be paid for it, and to be free from all obligations or expenses he may have incurred in relation to the matter. If the principal's instructions are such as to mislead the agent and to land him in loss, the principal will be liable to him in damages (*Mackenzie*, 18th July, 1879, 6 R. 1329). With regard to the goods of the principal in the hands of the agent, there are further rights to the agent. The agent has a lien over these effects, whether they be goods, documents of debt, or moneys coming into his hands in the course of his agency, to the effect of securing payment of his commission and securing his indemnity from any obligations undertaken by him on behalf of the principal. It is by virtue of this rule that bankers have a lien over moneys and documents of debt of their customers in their hands. As I mentioned to you, in law bankers are in one aspect simply factors, or agents to manage the money affairs of their customers, and it is in virtue of the general relationship

of principal and agent that they have a lien over all the moneys and documents of their clients in their hands. The exceptions to that lien are such as these—that bills sent to the banker for a special purpose; bills which the banker has discounted for the customer, or which the banker has debited in the account and for which he has been paid by entries on the credit side according to the rule in *Lang v. Brown*, 12 D. 113, cannot be held as securities for the general balance against the customer. With regard to money and goods in an agent's hands, belonging to the principal and kept apart in a separate account or place, the rule is that they remain the property of the principal and form no part of the agent's estate. So long as they remain distinguishable from the agent's private funds or goods on the agent's bankruptcy, the principal is entitled to claim his own out of the hands of the agent's creditors and of everybody else who lays claim to them in right of the agent. It has been decided in the case of a bank agent who became bankrupt, that the bank, his employers, were entitled at once to enter into possession of, and take under their own charge all moneys and documents in the agent's office; and it is believed that banks usually reserve this power of entry at any time in the contracts which they make with their agents. The like power to a principal to vindicate his funds or goods from the possession of his agent or his agent's trustee is exemplified in the case of *Macadam*, 5th November, 1872, 11 M. 33. Two old ladies had sent a sum of money to an agent to be lent out on heritable bond. There was some difficulty about the title, and the money could not be invested at once. Meantime the agent lodged the money in the British Linen Company's Bank, on deposit-receipt, in his own name, and soon thereafter the agent died and his estate was sequestrated. The trustee in his bankruptcy claimed the money as belonging to the agent, and proposed to let the clients only have an ordinary ranking upon the sequestrated estate for the amount which they had entrusted to their agent. The rule, however, was applied that a principal can follow his goods and moneys in the hands of the agent or mandatory, if they are still distinguishable from the agent's private funds. That rule is thus expressed by high authority: "If a trustee pay trust-money into a bank to the account of himself, not in any way

earmarked with the trust, and also keep private moneys of his own in the same account, the Court will disentangle the account, and separate the trust from the private moneys, and award the former specifically to the *cestui que trust*." So that in this case, where the clients recovered their money, you see an example of the same principle which was followed in the case of the bank agent, that the principal is entitled to follow his own goods or moneys in the hands of his agent, and recover them even against the agent's creditors.

With regard to the goods of the principal, I have in conclusion just to notice to you the provisions of the Factors' Acts, which are of considerable importance. These Acts are 4 Geo. IV. c. 83; 6 Geo. IV. c. 94; 5 & 6 Vict. c. 39; and 40 & 41 Vict. c. 39—all of which are called the "Factors' Acts, 1823 to 1877." Some remarks have already been made on the last of these Acts, which extends still more widely their principle of giving validity to the dealings of persons ostensibly vested in full ownership or management of goods or documents. The older Acts proceeding on the same principle, were intended generally to meet a case such as this. An agent, called generally a factor, is entrusted, let us say, with the goods of his principal. He has got them as agent, but the principal may have given him special private instructions that he is to hold these goods until he get orders from the principal; that he is not to sell them, nor to pledge them, unless under his principal's express orders. The agent may have dealt with a third party, who was in good faith ignorant of any limitation on the agent's powers; he may have sold the goods to this third party, or may have taken an advance on them from another third party who was innocent of any attempt to defraud the principal. In circumstances of that kind, as the law stood independent of these Acts, the result would have been this in England, if not in Scotland. The principal, on the ground that the agent or factor had no legal title or authority to sell or pledge these goods, could force the third party, though entirely innocent, to give them back, and that without repaying him any money which he had paid or advanced to the agent or factor for the goods. These Acts were intended to meet that case, and it has been decided by the House of Lords that they apply to Scotland, though it had been thought by Scotch lawyers that the Common Law was enough to protect

a *bond fide* third party dealing in such a case with the agent or factor; *Vickers*, 2 L. R. Sc. App. 113. These Acts provide that where an agent having the custody of goods, bills of lading, or delivery orders and the like, documents of title, sells the goods, or pledges them for an advance to a banker, or any third party, who makes the advance or purchase in good faith, the advance or sale shall be good against the principal. The conditions are that the goods or the title thereto are in the hands of the agent, that the third party shall have been acting in perfect good faith, not knowing there was a prohibition on the part of the principal to sell or pledge; and these conditions being fulfilled, the sale or pledge will be good against the principal, even though it may be contrary to the distinct orders of the principal to the agent. The main exception to the statutory rule is, that the pledge of the goods shall not be for an antecedent debt of the agent. It must be a new advance given to the factor. Nor according to a Scotch case can the third party, acquiring title from the agent or factor, hold for the general balance if the special advance has been paid (*Pochin*, 11th March, 1869, 7 M. 622). The factor is not allowed to pledge the goods or sell them in order to settle a long outstanding debt which he has been owing to the third party; but within these conditions a third party can deal with perfect security, and acquire a perfectly good title by a sale or pledge of the goods. These Acts fully illustrate still further the wide principle of holding-out already mentioned—that wherever you find a man held out to the public ostensibly as having certain powers, and other people have viewed him as having these powers, and he has used them, the principal will not be heard to say that the agent did not possess these powers—that he exceeded his authority. The ostensible powers of the agent will be held as valid in favour of all the world, even against instructions given to him by the principal. The important words of the third of these Acts are: “Any agent entrusted with the possession of goods or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bond fide* made with such agent so entrusted.”

LECTURE VII.

PRINCIPAL AND AGENT.

OUR subject in this lecture is the liabilities that may be incurred to third parties by a principal and an agent respectively in respect of dealings in the course of the agency. You observe that in our previous lecture on principal and agent we discussed chiefly the subject of the agent's powers and the liabilities between himself and his principal; and I want you to notice that we are now to consider the liabilities that may be incurred by an agent or principal to members of the public, to the outside world, through an agency.

In the first place, we have to notice this one general rule—that any agent professing to act for any principal always warrants his own authority; he always is held to contract with any third party that he has authority to act for the principal whom he names, and whom he professes to represent. The consequence of that implied warranty is, that if it is found out that he has no authority, the person who has taken upon himself to act as agent will be liable personally to the third party to put him in as good a position as if the contract had been binding on the professed principal. That is a thing, accordingly, which you have to keep in mind. It will be no defence to an agent to say that he acted in perfectly good faith, and believed that he had authority, though it has turned out that he had none. He must answer to the third party with whom he contracted for the want of authority which he professed to have, and did not have. Then, that being established, the next thing to consider is, that an agent acting for a principal may contract in one of two ways. He may contract either expressly as an agent on behalf and on account of his principal; or he may contract in his own name without mentioning who his principal is, or that he has any principal. We shall take these two cases, and consider their results upon

liability to third parties. If an agent has contracted expressly as agent on behalf and on account of a named principal, then he is not liable on the contract. He is liable, as I told you, for warranty of his authority,—that he has authority as an agent,—but beyond that he is not liable on the contract. The contract is made simply between his principal, his constituent, and the third party, and the agent has no responsibility on it. He is not liable personally. Now that is the usual manner in which an agent contracts. You are familiar with that mode of contracting in the signatures of bank agents. The deposit-receipts and other documents which are issued on behalf of a bank all profess to be made on behalf of the bank, and are signed expressly by the agent as such. An agent in that case incurs no personal liability; his constituent, be it a bank or other principal, is the party alone personally liable to the third party. But in the other case which I have mentioned, and which also occurs, the agent does not say he is an agent entering into a contract for another,—he contracts simply in his own name, without disclosing his principal. In that case a different result follows. The agent is liable to the third party exactly as if he were the principal; the third party can sue him on the contract, and enforce his liability, just as if he were a principal. In the same manner, the agent who has contracted in that way without disclosing his principal can sue on the contract and enforce it in his own name against the third party. That law is fixed. In the first case I told you of, where an agent acted expressly as an agent of a named principal, the agent cannot enforce the contract, and is not liable on it; but in this case, where he contracts without disclosing that he has a principal, the agent is liable, exactly as if he were the principal, to the third party, and can sue the third party exactly as if he had contracted with him in his own behalf. But from the fact that the agent is an agent, though he has contracted in his own name, it follows that the third party, if he discovers there is a principal behind the agent, can go against that concealed principal. The only condition required before he can have this recourse on the undisclosed principal, is that no prejudice shall thereby be done to the concealed principal. If, while the third party has or has not known that there is a

principal, he has continued dealing with the agent, and on the agent's credit, and the principal has in the meantime altered the state of the account between himself and the agent, so as to render it to his prejudice to have to pay the third party, then the principal shall not be liable to the third party. To put a case: suppose an agent has purchased goods in his own name without disclosing that he has a principal behind him, the consequence of that contract is that he is liable to the third party for the price of the goods. But the third party, if he discovers that there is a principal behind the agent, and finds out that principal, may go to the principal and demand that he shall pay for these goods bought for him by the agent. The constituent may, however, have in the meantime paid the price to his agent, and the agent may have become bankrupt before the seller makes any demand on the principal as the true purchaser. In such circumstances, the question frequently comes to be, whether the third party, seller, or the principal, buyer, is to lose the price; and this is a question on which the decisions of the Courts have varied. In some cases the Courts seem to have laid down that the general rule of recourse upon the undisclosed principal would suffer exception whenever he could show that he had paid the agent, and would be exposed to prejudice if the seller to the agent were to have recourse on him. In other cases the sounder view is adopted that such prejudice is not a good defence against the third party's claim, unless the latter has himself produced it by keeping only to the agent's credit. The difficulty of fixing the true limits of liability is well illustrated in a case that occurred in the English Courts, in 1872—*Armstrong v. Stokes* (7 Law Reports, Q. B. p. 598). That was exactly the case which has been put. An agent had purchased in his own name; the principal had given the agent money to pay for the goods, but the agent had failed, and then the seller found out there was a principal, and wanted to make him pay a second time. The Court held that there could be no recourse against the principal, because the state of the accounts between the principal and agent had been altered to his prejudice. Where a purchase is made by an agent it has been said "the agent does not of necessity so contract as to make himself personally liable; but he *may* do

so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent." Another similar case, in 1880 (*Irvine v. Watson*, 5 Q. B. Div. p. 414) has, however, laid down again an older and sounder rule. It is not enough to prevent recourse that the principal shows prejudice, as by payment to the agent; the third party seeking recourse must have barred himself by some conduct which put the principal off his guard, and induced him to pay the agent. The doctrine now approved is stated in these terms :—"If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money, on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal." The practical result would seem to be that where the seller knows his contracting party is an agent, though he does not know who the principal is, he will be barred from recourse on the principal, if he keep to the credit of the agent and do not without delay find out and claim upon the principal, who has, in the meantime and without warning of any claim by the seller, paid the agent. On the other hand, if he does not know anything of there being a principal until after the agent has failed, I do not see how he can be barred on the plea of having permitted or induced payment to the agent. It is enough, I should think, to preserve his recourse on the principal if, so soon as he knows that there is a principal, he claims his recourse. *M'Intosh*, 10 M. 304. It follows from the rule that the principal may be held liable on a contract by an agent in his own name, that the undisclosed principal is entitled to enforce the contract against the third party. That is

to say, take the case of an agent contracting in his own name without revealing that he has anybody behind him, yet, nevertheless, having a principal, that principal may sue on the contract, and enforce liability against the third party. But it follows also in that case that the third party who had not known there was a principal, though he is liable to the principal, is entitled to plead compensation on the state of accounts between him and the agent. If the third party in such a case had a contra account against the agent, he is entitled to set that against the principal's claim, simply because the contract was entered into with the agent as if he were a principal, and it would be unjust that the third party should be liable to the principal in any higher degree than he is liable to the agent. The rule is otherwise where one of the contracting parties is known to be an agent for some one though his principal is not disclosed. In this exceptional case, the principal suing on the agent's contract cannot be met by any plea of compensation against the agent. *Matthews*, 18th July, 1874, 1 R. 1224. The two main cases that occur in the manner of making contracts are that the agent contracts in his own name, binding himself personally as if he were a principal; or he may contract as an agent on behalf of a named principal, in which case he is not personally liable to the third party. Now, it is curious and worth noticing that there are two special classes of agents, as to one of which it is the rule of mercantile usage that they contract on their own personal liability; while those of the other class are bound to contract only in the names of their principals. The first class are those who act for foreign principals. Agents for foreign houses in this country are not presumed in fact to have the right to pledge their principals' credit to a person contracting with them. The presumption is that they bind themselves, and not their principals, in any contract into which they may enter; and in the absence of an express authority to that effect they cannot pledge their foreign constituents' credit. Thus, for instance, if a French house has an agent here, and that agent orders goods, the general understanding is that that agent is personally liable on that contract as if it were made in his own name, and that he had no authority to bind by his contracts employers not resident in this country. That is the usual rule in regard to a foreign principal, and on that rule

agents for foreign principals often contract in their own names. They may contract in the ordinary way of an agent on behalf of a principal; but that is less usual and is not to be presumed. It will be presumed that they are acting for themselves unless in the most express manner they state that they are acting only as agents, and unless they, in fact, have authority to bind the principal, which authority is not presumed to be given to them. (See *Millar*, 17th February, 1860, 22 D. 833, Hutton 9 L.R., Q.B. 572.) With regard to another class of agents, a different rule holds. These are brokers,—a most important class in modern business. They include all people of the class of shipbrokers, and of people who get freights for ships, who make charter-parties, marine commission agents, stock-brokers, brokers in the tallow or other markets. These brokers,—we are not so familiar with them in Scotland as in England, but they are becoming numerous now in Scotland,—are middlemen, negotiators. Thus A has goods to sell; B wishes to buy such goods. But A and B do not know one another, and a broker is a middleman who introduces them to one another, or makes a contract between them. So in the Stock Exchange, if we want to buy or sell, we go to a broker who knows another man, or a broker who has a client who wants to sell or buy, and a contract is made between the broker of the buyer and the broker of the seller. The broker is a mere middleman, and his proper business as negotiator is simply to contract for, and as an agent of, his principal. That is his duty, and he is paid a stipulated commission which his principal owes him. The relation of broker is fiduciary; it is a relation like that of other agents. He cannot lawfully take commission from both sides, as is sometimes attempted, and his relation can never be misunderstood if he takes care to keep in his proper line of business, which is simply to make a contract between two named parties. Brokers on the Stock Exchange, however, usually transact between themselves, with personal liability according to the rules of the Exchange; and the names of the respective principals do not appear except in the comparatively rare occasions when a *bond fide* sale or purchase has been carried through and is completed by actual transfer of the stocks or shares. The main check on speculative transactions is contained in 30

Vict. c. 29, which requires the number of the shares, or the names of the persons by whom stock in banks is held, to be given, in order to render any contract for their sale and purchase valid. I may mention in passing, as an illustration of the extent to which brokerage is spreading in Scotland, the case of brokers for getting loans of money. That is rather a peculiar business, but say a person wants to borrow a sum of money here, a broker undertakes to get the loan on a charge of so much per cent. as brokerage. It is not the broker's money; but the broker merely introduces the man to the person who has the money to lend. That branch of business is now extending in Scotland, and in two recent cases (*Moss*, 20th March, 1875, 2 R. 657; *White*, 11th June, 1876, 3 R. 1011), another kind of brokerage was found to prevail in London, and in shipping ports, such as on the Clyde. It is that of a broker to sell or purchase ships. Frequently cases of this kind arise. A man wants to buy a ship or to contract for getting a ship built, but he does not know what shipbuilder is most likely to suit him. He goes to a broker who makes it his business to know where ships can be had, and the broker introduces a shipbuilder as most likely to have a ship to suit the purchaser. This broker charges a commission usually of about $2\frac{1}{2}$ per cent. to the shipbuilder for the introduction. That commission is added to what the purchaser has to pay in the name of price of the ship, and the shipbuilder gives that part of the price in name of commission to the broker. That is a brokerage custom proved to exist in London, on the Thames, in Liverpool, and on the Clyde. The custom was held to be established in recent cases, and extends to this—that the broker is entitled to commission on the first piece of business which is done between the parties whom he has in this way introduced.

The next thing to be noticed is, that in order that an agent may contract purely as an agent and not bind himself personally, we have to attend to the form of the contract into which he enters. Now the general rule that is laid down with regard to the contracts entered into by any person whatever, is, that if he signs in his own name without addition or qualification he is personally liable; so that the first thing to be observed by an agent who wishes merely to bind his prin-

principal and not himself is, that he ought to sign any document expressly as an agent and on behalf of his principal. The rule laid down is, that there being any contract submitted to the Court bearing a signature unqualified, without addition, it is held *prima facie* to bind the signatory personally. The first care of an agent who wishes to bind his principal and not himself is, that his signature should bear the addition of such words as "agent, and on behalf of" the principal. The signature is the first thing to be looked at. An agent may, however, say that, though he has signed without qualification, he showed his intention to bind his principal and not himself by expressions in the body of the contract note. You are aware that mercantile contracts are usually made in very brief forms as "Bought notes" and "Sold notes," which are interchanged between seller and buyer or their respective agents. Such contracts are brief and frequently informal; but it is possible for the agent, though he signs without qualification, so to express himself in the body of the contract as to make it clear that he is a person liable only as an agent. On this subject, I want to ask your notice, as showing the care that an agent ought to take of the way he makes contracts, to a case that occurred lately in the English Courts, the case of *Paice v. Walker* (5 L. R. Exch. 173). The defenders had signed a sold note in the following terms:—"Sold, A. J. Paice, Esq., London, about 200 quarters wheat (as agents for John Schmidt & Co. of Danzig). (Signed) Walker & Strange." The bought note was in the same way expressed—"Bought of Messrs. Walker & Strange, London, about 200 quarters wheat (as agents for John Schmidt & Co. of Danzig). (Signed) A. J. Paice." Well, the peculiarity of these notes you see is that you have Walker & Strange selling as agents, but that they signed the note in their own name, "Walker & Strange," without any addition or qualification whatever—not saying that it was on behalf of John Schmidt & Co. they contracted. The contract was not performed, and Paice sued Walker & Strange, as being personally liable, because they had signed the contract personally, and without qualification. The Court held that they were liable; and this is the doctrine as laid down by the Court—"It may be laid down as a general rule that where a person signs a contract in his own name without qualification, he is

prima facie to be deemed to be a person contracting personally; and, in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal." "Now," says one of the judges, "to apply that rule to the present case, the contract is here signed 'Walker & Strange' without more, therefore without any such qualification as is referred to in the rule I have cited; and that circumstance disposes of the many cases adverted to by Mr. Dowdeswell, in which the contract was signed by a person describing himself in the signature, and as part of it, as agent. That the incorporation of such words with, or their annexation to, the signature is the qualification referred to in the first part of the passage I have cited, is shown by the conclusion of the sentence, where 'the other portions of the document' are contrasted with the signature itself. The defendants therefore not signing as agents, is there anything in the contract to bring them within the latter part of the rule I have referred to, and to which I entirely accede, that is, is there anything in the document to show that the defendants did not intend to bind themselves otherwise than as agents? The words relied upon to show this are the words 'as agents for J. Schmidt & Co. of Danzig.'" But the Court held that these words occurring in the body of the contract were merely descriptive and were not sufficient to prevent the personal liability of the party who had signed; so that you see these unfortunate agents were held liable on this contract simply as they had signed it without qualification, although in the body of the contract they were mentioned as agents of the sellers. The decision did not turn on their being agents for foreign principals. In a later case the Court have not gone so far, but still far enough to be a warning to all persons acting as agents to be careful of how they sign. In the case of *Gadd v. Houghton* (Law Reports, Exch. vol. i. p. 357), fruit brokers in Liverpool, gave a fruit merchant the following "sold note":—"We have this day sold to you, on account of James Morand & Co., Valencia, 2000 cases Valencia oranges of the brand 'James Morand & Co.,' at 12s. 9d. per case free on board," and signed it, without any addition, in their own name—Houghton & Co. The contract not having been implemented, the purchaser brought an action against the agents; and the Court

held in that case, rather going back on the case *Paice v. Walker*, that Houghton & Co. had contracted only as agents, and were not personally liable on the contract. One of the judges says in *Gadd's* case—"When a man says that he is making a contract on account of some one else, it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself but is binding his principal. As to *Paice v. Walker*, I cannot conceive that the words 'as agents' can be properly understood as implying merely a description. The word 'as' seems to exclude that idea." Another judge says—"I can see no difference between a man writing 'I, A B, as agent for C D, have sold to you,' and signing 'A B,' and his writing 'I have sold to you,' and signing 'A B, for C D the seller.' When the signature comes at the end you apply it to everything which occurs throughout the contract. If all that appears is that the agent has been making a contract on behalf of some other person, it seems to me to follow of necessity that that other person is the person liable." So that you see the result is that the safe rule for an agent in making a contract where he does not want to be personally liable, is to qualify his signature by mentioning that he signs as agent on behalf of his principal. If he has not done that, and yet the body of the contract is so expressed as in *Gadd* as to show that he is signing it on behalf of a principal, he will not be personally liable; but unless he take care to do the one or the other of these two things, he will be personally liable.

A further remark about the mode in which contracts may be made is this, that the general rule which you all ought to bear in mind, in regard to all business documents, is that written documents cannot be contradicted by parole evidence. If you and I enter into a written contract, however informal, I shall not be allowed to discharge myself of its terms by bringing witnesses to say that some qualification or condition contrary to the writing was talked of which is not expressed in the contract. I know no rule which is more frequently forgotten by men in mercantile affairs than that a written contract is final between parties, and cannot be contradicted by witnesses. That rule suffers no modification in the case of principal and agent. If the agent make a contract, and sign it in his own name, so that he is liable on it as principal to

the third party, he will not be allowed to discharge himself to the third party by proving that the third party knew he was an agent, and that he was not to be held liable to him as principal; but, on the other hand, the third party will be allowed to show that the agent had a principal behind him. That is held to be no contradiction of the written contract. The agent is bound by its terms, but the third party is not thereby to be prevented from having recourse upon the contract against the principal. So that, though the contract is in the agent's name, the third party may prove by witnesses that the agent had a principal behind him, and hold the principal liable for the contract. The agent cannot get free of a contract made in his own name, and without disclosing his principal. He will be held personally liable, and cannot get clear by evidence that he was known to be an agent. You may add the principal to a written contract by showing that the signature is that of his agent; but you cannot discharge the actual subscriber of the personal liability incurred by his own act in writing.

So much in general with regard to the forms in which agents contract; but in dealing with gentlemen engaged in such an important business as banking, I have thought it advisable to discuss more minutely the rules bearing upon bills drawn, accepted, or endorsed by agents; and the first thing to be noticed with regard to these cases is that the signature to a bill, either by way of acceptance, or of drawing or endorsing the instrument, when written without qualification, as a general rule, binds the subscribers personally. That is even more distinctly the rule with regard to bills than with regard to ordinary mercantile contracts. The man who signs a bill in his own name, and does not say that he does so as an agent, or per procuration of anybody, is, as a general rule, personally liable on the bill. Nay, more, even if the subscriber merely makes some additions, such as manager, director, trustee, commissioner, after his signature, as it were, signing "John Smith, director," or "trustee," as a general rule, that also will bind him personally. That is not enough to escape, in the case of a bill, from personal liability. That was illustrated in a pretty strong way in connection with the directors of a limited liability company in the case of *Dutton v. Marsh*, 6 L. R., Queen's Bench, p. 361. Here was the promissory note which

the directors signed in that case :—" Isle of Man, 7th January, 1864. We, the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay John Dutton, Esq., the sum of £1600 sterling, with interest at the rate of six per cent. per annum, until paid, for value received." Then it is signed by "Richard J. Marsh, chairman, Joseph Higgins, Samuel Broadbent, Henry Johnson," and witnessed by Leslie Lockhart; and the company's seal was put upon the bill. Well, the bill was not paid, and the directors were sued personally, and the Court held that they were liable personally on that bill, though it bears to be signed by the directors of the Isle of Man Slate and Flag Company, and the first of them, signed "Richard J. Marsh, chairman." The rule laid down by the judges is just this—"If, therefore, in this case it had simply stood that the defendants described as directors, but without saying 'on behalf of the company,' signed the promissory note, it is clear they would have been personally liable, and could not be considered as binding the company." Thus, if the directors who were described as directors had added, "and on behalf of the company," then they would not have been personally liable; but although they were called directors, yet nevertheless they were held personally liable, because they had not qualified their signatures by adding "directors, and on behalf of the company." The effect of the authorities is clearly this—that where parties in making a bill merely describe themselves as directors they are individually liable. But, on the other hand, if they state that they are signing the note or acceptance as agents, or on behalf of some company or body of which they are the directors or representatives, in that case they are not held themselves as personally liable. Trustees would probably be required to go further, and to indicate that they bind themselves only to the extent of the trust-funds, if they wish to escape personal liability (*Brown v. Sutherland*, 17th March, 1875, 2 R. 615; *Muir v. City Bank*, 7th April, 1879, 6 R., H. of L. pp. 31 and 43). You must clearly bear in mind that an unqualified signature may be taken, as a general rule, to involve personal liability, and that the mere addition of such descriptive words as Director or Trustee to the signature on a bill may not be enough to limit the liability. The proper form in which to escape from personal liability when

the bill is granted in a representative capacity is to sign the usual *per procuration* if there is *procuration*. If persons are signing as directors, they must add such words as—"Directors, and on behalf of the company;" they must make it clear on their signature that they are incurring liability only for and on behalf of the company and the extent of its funds, and not a personal liability. So that the rule in regard to bills is even more strict than in the case of ordinary mercantile contracts.

Then another rule with regard to bills is, that if a bill or promissory-note, as is sometimes done, bears expressly to be accepted jointly and severally by the makers of the note or the acceptors of the bill, these words will involve personal liability. With regard further to the case of bills, when a bill is taken payable to the payee or his order, and that bill is in the hands of an agent of the payee who has no authority to endorse it if he nevertheless does endorse the bill he will give no title to a *bond fide* holder. If the agent have no authority to endorse the bill, and nevertheless endorse it, and if a bank discount the bill it will confer no title on the banker; and that is an additional reason why in the case of a bill proposed to be endorsed by an agent *per pro*, it is necessary to see that the agent really has the authority required. We looked strictly in a previous lecture to the circumstances in which an agent has authority to endorse a bill and need not repeat them; but I am talking of the case of an agent not having authority, and yet endorsing a bill payable to order. The consequence of that is, that he confers no title; and the bank cannot enforce it against the principal whose property the bill remains is. A different rule applies where a bill is payable to the bearer. If, for instance, there is a blank indorsation, or the drawer makes a bill payable to the bearer, then there is authority; an agent can confer a good title on that bill by handing it over; and, still further, if he endorses it. There is thus a difference between a bill payable to order and a bill payable to the bearer, because, as to the latter, the agent can give a good title to an onerous and *bond fide* holder.

I may next call attention to a protection which bankers obtained, curiously enough in a Stamp Act, 16 & 17 Vict. cap. 59, with regard to drafts or cheques payable on demand. That section, which passed without much notice to the public,

has given considerable protection to bankers against forgery. In the case of drafts or orders payable on demand, a banker, if he pays on a forged indorsation bearing to be that of the payee, is not liable for the amount to the true owner. It is assumed that the banker has exercised due caution in taking the forged indorsation, but assuming that he does, then the banker is protected by this statute from challenge of the forged indorsation. He has really paid, let us say to a person who had no title to the draft; but if the indorsation bears to be the indorsation of the proper party the banker is protected. Similar protection is given to a banker who pays a crossed cheque, drawn upon him, to another banker by whom it is presented for payment under a general or special crossing, 39 & 40 Vict. cap. 81, sec. 9. Moreover, a banker who acts merely as agent for his customer in collecting and uplifting the amount of a crossed cheque is not liable in repayment though the cheque turns out to be a forgery. This depends on a general condition applicable to all agents that the banker who uplifts the contents of the forged cheque has been in good faith, and that he has handed over the amount as it was received without himself deriving any benefit from the fraud (*Clydesdale Bank v. Royal Bank*, 17th March, 1876, 3 R. 586). Another specialty to be noticed with regard to bills is this. I have mentioned that a contract made by an agent in his own name on behalf of an undisclosed principal might be sued on against the principal, but that will not hold in regard to bills. Suppose the case of an agent granting a bill in his own name, and making himself personally liable, if, nevertheless, he has a principal behind him, you cannot make the principal liable as the acceptor by virtue of the agent's acceptance on that bill. You could, as I have mentioned, in ordinary contracts, and in the case of an agent contracting for an unnamed principal, go back on the real principal upon discovering him; but it is otherwise in regard to bills. If an agent has accepted a bill in his own name, you cannot go back on his principal, the reason being that by the Mercantile Law Amendment Act of 1856 nobody can be held liable as acceptor of a bill whose name is not actually signed as acceptor upon it. See also the Bills of Exchange Act, 1878, 41 Vict. cap. 13, and *Walker's Trustees v. M'Kinlay*, 1st July, 1879, 6 R. 1132.

Now, gentlemen, the next point that I want to take up is rather a delicate matter, but one which I shall do my best to make clear to you. It is the question, how far a principal is liable for the wrongful actings of his agent. Suppose this case. I am a principal and I have employed an agent to transact business for me. I intend him to act honestly, to do nothing but what is right and proper; but suppose he, by his negligence, or by his wilful dishonesty, has committed a wrong against a third party, it seems a hard thing for me, the honest principal, to be held liable for that wrongful conduct on the part of my agent. There are, however, obvious considerations of general policy and justice from which two principles have been derived, one limited to the case of employer and employee and the other of universal application. The first is, that the master, principal, or employer is answerable to third parties for the wrongful acts of his servant, agent, or other dependent representative when committed within the scope of his employment or in and about his employer's business. The second and broader principle is, that no person shall take benefit by fraud unless he is not only himself innocent of the fraud but has acquired its results for a valuable consideration (*Gibbs v. British Linen Co.*, 23rd June, 1875, 4 R. 630). In the application of these principles there are some distinctions which must be kept in view. If, for instance, I employ an independent contractor to do a piece of work for me, let us say to build my house; I put the whole matter into his hands under his contract, and if, in the course of building the house, he, by his negligence, say by leaving a heap of lime on the street in front of his hoarding, causes an accident, am I liable for that wrong on the part of my agent? Well, it is fixed I am not liable in that case (*M'Lean*, 12 D. 887). Where I have employed an independent agent or contractor to do a lawful thing, from which, if properly done, no injurious consequences can arise, I am not liable for his negligence or dishonesty in carrying out the contract which I have made with him. It would be quite a different thing if the contractor were my servant. If I were a builder, and the person working at the house were my foreman or workman, I would be liable for his negligence; but when he is an independent builder with whom I contracted, and when I left the thing in his hands to be managed properly by

him, I am not liable for the consequences of his negligence. Of course, it would be altogether different if I employed the contractor to do an unlawful thing; if I employed him to act in such a way as illegally to bring down my neighbour's house, or his wall, I am liable for having authorised him. Nay, when it is certain that mischievous consequences will arise to third parties from my intended operations, and thus, or in any other way, a special duty is thrown by law upon me, I cannot, by the employment of a contractor, relieve myself of all responsibility (*Bower v. Peate*, 1 Q. B. Div. 321; *Stephen*, 3 R. 535). But when I employ a contractor to do a lawful thing that can be done without injuring anybody, if any one is injured by his negligence, I am not liable for that. Another case is that of a principal who undertakes by contract to do certain work. A railway company, for instance, contracts to carry my goods in safety from Edinburgh to London. Now that carrier, the North British Railway say, does not go the whole way to London, and it employs other companies, who are sub-agents, for the performance of the contract. Very well, the first contracting party is liable for the negligence of any agent into whose hands he puts the execution of the contract. Take the North British Company as the principal contractors to carry goods in safety to London. If they choose to put the execution of their contract into the hands of other agents, they are liable to the public for any loss that may occur through the negligence of these agents. That is simply because if a principal is under a contract to do a thing to a third party, and chooses to entrust that thing to an agent, he is liable for the agent if the agent fail to perform the duty he is himself bound to perform. That happens, you know, in cases interesting to bankers, if, for instance, a customer of a bank sends a bill for collection. A case which did actually occur was that of the customer of a bank drawing a bill on some one in Calcutta, and handing it into one of the Edinburgh banks, to be presented for acceptance and payment, and, when paid, the proceeds to be put to his credit. The Edinburgh bank sent the bill to Coutts & Co., and Coutts & Co. sent it to their agent in Calcutta. The bill was accepted duly and paid duly to the bank agent in Calcutta; but the agent in Calcutta failed, and the money never was remitted home. The customer in Edinburgh

sued the bank here, and urged—"I gave you my bill, and you undertook to collect it, and put the proceeds to my credit. I have nothing to do with how you managed the business which you undertook for me. You might have sent a clerk out to Calcutta to do so, for anything I had to do with it, or you might have arranged in any way you pleased. You undertook to collect it, and I hold you liable for the amount. I am not responsible for your agent." The Court of Session held that the bank was not liable; but the House of Lords held the bank liable to the customer, "for," they said, "the customer had nothing to do with the manner in which the bank collected the money. All we ask is, did the bank undertake to collect the money, and was the money actually got from the customer's debtor?" These things being shown, they held the bank liable to give the customer credit for the bill. The same thing has occurred in a different way with regard to a country customer paying his money to a bank agent, specially to meet a particular acceptance in London. The country banker sent up the money to his London correspondents, but gave them no intimation that the money was specially appropriated to meet a certain acceptance of his own customer; and the London banker put the money to the general account of the country bank. Thereafter the country bank failed, and its customer wanted to get the money from the London bank; but the Court held that the London bank was entitled to put the sum to the general account of the country bank; that it had nothing to do with the relations between the country bank and its customer, being no party to it; and that the special appropriation, of which no notice had been given, only applied as between the country bank and its customer. Had it been the London bank which had failed, the country banker would have been responsible to the customer.

The next point to be noticed, and it is a principle of wide extent, is that a constituent can in no case take benefit by the fraud of his agent committed against third parties. Thus, for instance, if a merchant has employed an agent to enter into a contract for him to get a third party say, to buy or sell goods; and if the agent induces the third party to enter into the contract by means of misrepresentation and fraud, although the principal is quite innocent and knows nothing about it

personally, the principal shall be held liable for the fraud in this sense, that he cannot enforce the contract obtained by fraud, or if goods or moneys have been obtained by the agent's fraud, the principal cannot take the benefit of them, and is bound to return them. This principle was acted on the other day in a curious case, that of the Clydesdale Bank against Paul. It occurred on the 8th March, 1877, in the Court of Session, 4 R. 626. In that case a stockbroker's clerk had been acting for himself for a considerable time in the name of his principal, but without his authority. He had run up an account so that his principal was liable in a large sum, some £7000. To cover his defalcations this clerk forged his master's name to a cheque for £4800, and actually got the money from the Clydesdale Bank. The money so obtained he applied to the account which he had run up in name of his principal. The principal was legally liable for this large account of £7000, and the £4800 was, therefore, applied in a sense, for his master's benefit, to meet the account that had been improperly incurred in his master's name. The question in this case was whether the master was liable to the Clydesdale Bank for the £4800; and as the money had been used to meet the master's legal liabilities, the Court had no hesitation in deciding that he was bound to relieve the bank. One of the judges says—"The Clydesdale Bank sue Paul and his Trustee—Paul was the employer—on the ground that the money was obtained from them by the tortious proceedings of Paul's agent and representative, Martin, and that the money so obtained was applied exclusively for the benefit of Paul. On the combination of these two facts the liability of Paul and his trustee is rested, and I think that if these two facts are established the liability is perfectly clear. No doubt, an agent will not be held to be authorised to commit a forgery or any other wrong; but if, in the course of doing his business of agent, he does commit a wrong or a crime, and if the principal is benefited, then he is liable to the extent to which he is benefited. That is the plain and simple ground on which this case falls to be decided." So that there you see is a fraud committed by an agent, but the proceeds of that fraud were paid in as it were to the principal's account; and it was held that though the principal had

not authorised the fraud, though it was merely an attempt to conceal a fraud on the master previously committed by the agent, yet nevertheless the master was not allowed to take benefit thereby, and was held liable to the bank for the whole £4800 which his agent had obtained by fraud. That is an illustration of the doctrine that a principal can in no case take benefit by fraud of the agent. In the case which has been mentioned, the liability of the principal was rested solely on his having obtained some benefit by the fraud. Where that element of benefit to the principal is wanting, as in a similar case of misconduct by an agent for his own purposes (*Sinclair, Moorhead & Co.*, 7 R. 874), the principal will not be liable for the agent's fraud. But, as we have seen, there is another ground whereby a principal may be held responsible for an agent's fraud or wrongful conduct, even where it is impossible to show that the principal has obtained actual benefit by the agent's wrong-doing. This ground for the principal's liability depends on the agent having committed the wrong when acting within the scope of his employment, or in the course of conducting business for his constituent. The cases in which this has been held are cases where, for instance, an agent, a bank agent let us say, has used his position with the view of committing fraud. A bank agent authorised to issue deposit-receipts in a country bank, if he grants a deposit-receipt for money that is actually given to him, but makes away with that money, absconds and never puts the money into the bank coffers; the bank will, nevertheless, be held liable for the money. That occurred in our Court in the case of *Craw v. The Commercial Bank*, 9 December, 1840, 3 D. 193. A bank agent in the country issued a deposit-receipt for £3000, but never entered the money in the bank books, and put it into his own pocket. The bank was, nevertheless, held liable. You see they were not benefited by the fraud, but the principle is just this:—Here is the agent of the bank in a position of trust and confidence, held out to the public as having authority to grant obligations such as deposit-receipts under the supervision of the principal. If a person in that position commits a fraud on a third party, it is just that the principal who put him into the position to commit the fraud should be made liable, and that the third party who has been the victim should

not suffer. Where of two innocent parties one must suffer by the default of a wrongdoer, he must bear the burden who has enabled the wrong to be done. All the more does this principle apply where a person has not only invested the wrongdoer with the position or authority which enabled him to commit the wrong, but the wrong-doer has also acted through over-zeal for his master's business. This has been well illustrated in *Mackay v. The Commercial Bank of New Brunswick* (5 P. C. Appeals, p. 394), already mentioned in another connection. There the manager or agent of a bank procured the acceptance in England of certain bills, in which the bank were interested, by a misleading and fraudulent telegram, and the bank was held liable to relieve the acceptor against the consequence of their agent's fraud. The same thing was held in a case where a bank manager procured goods for a customer on a misleading guarantee that the price should be paid. The bank was held liable for the price (*Barwick*, L. R. 2 Ex. 259). And so in the case of bank managers giving assurances as to the credit or responsibility of parties. Where this has been done fraudulently, their principals have been held bound to answer for the agents' wrong. In general, "the master is liable for every such wrong of his servant or agent as is committed in the course of his service, and for the master's benefit; because, although the master may not have authorised the particular act, he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of the master to place him in" (*Houldsworth v. City Bank*, 12th March, 1880, 7 R. p. 57 H. of L.)

Of course, these things are to be taken with this qualification—that the act of the agent shall be such as to give no warning to the third party that he is acting on his own account, and outwith his principal's business. If the documents were of such a nature as to convey a warning that the agent was acting for himself, independently of the bank or his employer, the employer will not be liable; but if it is a document granted apparently in the ordinary course of business, and granted fraudulently, that document will render the principal liable to answer for it. The application of this principle to incorporated

companies is no longer doubtful. They are answerable, like any other principals, for the wrongs of their agents by which they have benefited, or which have been committed in the course of the agent's employment, and in mistaken furtherance of the interest of the company. It is only, as is shown in recent cases arising out of the City Bank liquidation, in regard to the purchase of shares induced by the fraud of the directors as agents of the bank that redress is barred by stoppage. While the bank is a going concern, the person induced to become a shareholder by the fraudulent representations of its officers has full right to be restored against the fraud by rescission of his contract, or by a claim for damages. Both claims are barred by reason of the rights which emerge in innocent creditors and shareholders upon insolvency and stoppage (*Tennent*, 20th May, 1879, 6 R. 68; *Houldsworth*, 12th May, 1880, 7 R. 53). The agent who himself committed the fraud or other wrong is always liable in reparation to the injured party.

The other matters remaining for consideration are as to how this relation of principal and agent may be terminated. These are simple matters. Of course, by mutual arrangement between the principal and agent, the relation may be at once terminated. But there is this further peculiarity in most kinds of mercantile agency, that the principal may at any time revoke the agency. He may recall the agency at his own will and pleasure. He is not obliged to allow the agent to go on for any definite time; and he may, as a general rule, recall the power at pleasure. The principal may be liable in damages, if he has contracted for the employment of the agent during a specified period, as for dismissing him without just cause; but he cannot be compelled against his will to allow the agent to continue. Another case may happen. In the case of the bankruptcy of the principal, the agency is revoked. The same thing happens in the case of the death of the principal; that will revoke the mandate too. But these things are to be taken with this qualification—that, in case of revocation by the principal, the agent, if he is engaged in a transaction which is not completed, will be allowed to go on and complete the transaction—will be allowed, in short, to extricate himself from a transaction with a third party, even in face of an express

revocation of the agency. In short, an express revocation is to be taken reasonably. It is not that, at the moment it comes, the agent is to be stopped: it is only that he is not to go into new transactions; he will be allowed to go on and wind up the transactions that are in course. Another thing is, suppose a principal has given an agent authority to act for him, and dies or becomes bankrupt, and that the agent does not hear of his death or bankruptcy for some time. If the agent goes on in good faith and continues the agency, he will still bind the representatives of the principal, though really the agency has fallen.

Then in regard to the principal, this further thing is to be taken into account. The principal owes a duty to the public when he recalls an agency. If he wishes to keep himself safe from the further actings of his agent, he is bound to give notice to the customers whom the agent has dealt with. In the case of the public who have been dealing with the agent, his only safety is to send circular letters to the customers announcing that the agent no longer acts for him. These things are necessary to keep the principal safe from the agent's proceedings, by virtue of his ostensible authority being continued. The proper course is to insert a notice to the public in the *Gazette* and in the newspapers that the agent has no longer power to act, with special notice by circular to the customers and others who have had dealings with the agent on the principal's behalf. The case of termination of the agency by the death of the principal is somewhat different, as in the books it is treated as a public fact that requires no notice; so that, a reasonable time having elapsed, it will be supposed by the Courts to have reached the knowledge of the customers of the agency, and no special notice will be required. In all other cases, the general and safe rule is to give notice of the termination of the agency, and this is rendered all the more necessary by the second section of the Factors' Act of 1877, mentioned in the last lecture. "Where any agent or person has been entrusted with and continues in the possession of any goods, or documents of title to goods, within the meaning of the principal Acts as amended by this Act, any revocation of his entrustment or agency shall not prejudice or affect the title or rights of any other person

who, without notice of such revocation, purchases such goods or makes advances upon the faith or security of such goods or documents."

This concludes what I have to say with regard to principal and agent, and I hope next to proceed with the analogous subject of partnership.

LECTURE VIII.

PARTNERSHIP.

OUR subject in this lecture is the Law of Partnership. You will observe that we intend, in the last lecture of our course, to treat of the law of companies, which is statutory; to-night we deal with the law of partnership at common law. Now partnership has been frequently defined or described, and it is a little difficult to give a correct definition of it; but it may be said, with approximate accuracy, that partnership is an association of two or more persons for the purpose of carrying on a lawful business and the division of the profits therefrom between them. I ask you to consider for a little the terms of that description. In the first place, it is an association. This does not mean that all the partners are to be alike active in the management of the concern. It is enough that they be associated; as to its management, one partner may be an active partner, and another only a sleeping, latent, or dormant partner,—that is to say, there may be one or more partners who take an active share in the management of the concern, while others may take no part ostensibly in it at all. Their association means a mere agreement or combination for the purpose of partnership. Then it must be an association of two or more persons. One man may, indeed, trade under a company name. That often occurs; and in that case you hear him described somewhat awkwardly as “sole partner;” but it is quite certain one man cannot make a partnership, although he may trade under a firm’s name. There must be two persons at least in order to form a partnership. On the number of partners there is a restriction by statute. Formerly, under the common law of Scotland, any number of persons, hundreds or thousands, might enter into partnerships and in that way form joint-stock companies at common law. But by Statute—the

Companies Act of 1862—it is now provided that no company can be formed consisting of more than ten persons where the business is banking unless the company is registered under that Statute, and that not more than twenty persons can be associated together as a company for any business other than banking unless registered in terms of that Act. The consequence is, that joint-stock companies will, for the most part, cease to exist under the common law, and will have to be registered under this Act; for they generally consist of more than twenty members. That provision restricts our subject to partnerships which do not require to be registered under that Act,—those of twenty persons or less, where they carry on general business; or ten or less, if they are associated for the purpose of banking business. The next thing in our description is, that it must be an association for the purpose of carrying on a lawful business. An association, say for the purpose of carrying on smuggling or betting, or any other traffic struck at by statute or common law would not form a lawful partnership at all—that is, no action could be raised, *inter socios*, relating to their unlawful business. They might incur obligations to innocent third parties; but they would have no rights which could be enforced at law arising under the partnership. A further item of our definition was, that the object of the partnership must be the division of the profits of a mercantile business among the partners. That, you will find, is a characteristic feature of all partnership contracts, and a feature that has often been brought into prominence in the question whether or not a man is a partner in a given concern. It is a fair test of the existence of a partnership relation, whether or not a man draws profits from the concern—whether or not in short the concern is managed for his behoof. You will find as we advance that the mere drawing of profits alone is not necessarily or conclusively proof that a man is a partner; but as a general rule the fact that a man draws profits, that the business is managed to this extent for his behoof, is good evidence in law that a man is a member of a copartnership and liable to its creditors. So that one may define a partnership as an association of two or more persons for the purpose of carrying on a lawful business and the division of the profits thereof between and among them.

Now we have seen already that there may be joint-stock companies at common law. The chief peculiarity of these joint-stock companies is, that where they consist of a large undefined number of shareholders the Courts were in the habit of holding that their shares might be transferred like the shares of a railway company or other body incorporated by Act of Parliament; but, as I said before, the importance of these common law joint-stock companies is now so small that we need not spend much time over them. The relations that we have to consider are those of the proper private partnership which is distinguished as of two kinds—the private partnership for the purpose of carrying on business for an indefinite or fixed time, and the joint-adventure which is a partnership relation for the purpose of merely managing certain transactions. Thus two men or three men may join together for making a purchase of grain or for carrying on certain speculations in the iron market. These are private joint-adventures; but so far as they go and in so far as the relation extends they are governed by precisely the same principles as the ordinary and more extensive partnership relation. There is one peculiarity to be noticed about them—that is with regard to the liability of the partners. Supposing one man agrees to contribute a certain amount of iron, let us say, for a joint-adventure, which is to be used perhaps for building a house or a ship—the house or ship being the subject of the joint-adventure. Well, this man must do so at his own expense, and the person who supplies the iron will have no action against the other joint-adventurers, because that is his contribution which he agreed to supply. In the same way when an author agrees to supply the MS. and a publisher to supply the paper and the printing on the terms that the author is to take perhaps one-half of the profits and the publisher the other, the author is not liable for the printer's account; for that is the publisher's contribution to the joint-adventure which he undertakes to supply on his own individual responsibility. These are, however, just things to be noticed by the way. The general principle is, that a joint-adventure once established is governed by the rules regulating the ordinary private partnership, to which accordingly we now exclusively turn.

There are four things to be noticed with regard to these

private partnerships at common law. The first is that in all cases there is unlimited liability to third parties. Each partner in the concern incurs liability to the full amount of the whole debts: he must pay these debts with his whole fortune. You are aware that the principle of limited liability was introduced lately, but that was introduced solely by the force of statute. At common law, short of incorporation by Royal Charter, there is no way whereby, in a partnership once constituted, each partner shall not be liable in every penny of his fortune to third parties. That is the first principle with regard to common law partnerships, and it received, as some of you know, a rather startling illustration in connection with the winding up of the Western Bank. Till that time it had been believed in Scotland that if trustees took bank shares, or shares of any other company, or perhaps agreed to carry on the business of the deceased, then, so long as they held these shares or carried on the business simply as trustees, they would not incur personal liability. As a legal theory, entirely unintelligent to English lawyers, trustees in such cases were supposed merely to continue the *persona* or legal existence of the defunct trustor. Now, in the Western Bank case there were many trustees who had taken shares of the bank, and who were entered in the share list as trustees. In one case that came before the Court, that against the trustees of Mrs. Ellen Brown, they were distinctly entered in their trust capacity in the share list. Well, the Court of Session, when the question came up before them, held that these trustees were not personally liable—were only liable to the extent of the trust-funds. The question arose, no doubt, with the liquidator for the Western Bank, and was treated as a question between partners. That led to a very full trial of the question of limited liability, and the judgment of the House of Lords is accordingly of consequence as showing that trustees entering into any such companies incur full unlimited liability. In the case of *Lumsden v. Buchanan*, 22nd June, 1865, Lord Cranworth said:—"If, instead of becoming shareholders in a joint-stock bank, they had alone opened a bank, it surely could not be argued that they would not be liable to depositors or others merely because they described themselves as trustees for Mrs. Ellen Brown; and if they would have been responsible in case

they had been the sole bankers, I can discover no ground for contending that they would not have been so if they were associated in partnership with others. Here they are bankers associated with a very large body of partners, but not associated on any terms which affect their liability to third persons. They do not, it is true, themselves interfere in the conduct of the business; but they share rateably with the other partners in its profits, and delegate the management of it to others as their agents. A creditor who has recovered judgment against the company may take out execution against any of the shareholders, which would include all, whether described or not described as trustees, and if the debt should be levied on their goods it would be a strange equity to set up against the other shareholders that they ought to contribute more than their rateable proportion by reason of the trust-property proving deficient. These considerations have led me to the conclusion that trustees taking shares in these joint-stock concerns make themselves personally liable as partners, even though they describe themselves as trustees." So that this case has fixed the rule ever since, that trustees managing a business on the death of a trader or taking shares in a company will incur the burden of all liabilities in an unlimited company, and that even in questions with copartners. "But of course this general principle," it was said, "must give way to any express provisions in the deed of copartnership, limiting the responsibility of such shareholders. But so far from there being any such restrictions in the deed now before us, there are several clauses which seem to me to exclude the notion of any such restriction." No case has yet occurred in which, even as between partners, trustees have been held free of unlimited liability. It would require a stringent provision and express contract for liability only to the extent of the trust-funds; but this case shows that in regard to third parties it is impossible that trustees can escape full personal liability when they take shares in an unlimited concern. The case of *Lumsden v. Peddie* is even stronger at 5 Macpherson, p. 34. A *curator bonis*—that is to say, a judicial factor, had taken shares in the Western Bank, and that expressly as *curator*; but there, too, the principle was held that he was personally liable. So that may be assumed to be the general rule; and it is now acted upon in practice.

These cases, however, though well known to all lawyers, had no effect to prevent trustees and other persons acting in a trust capacity from incurring personal liability as they did by taking shares in the City Bank, which was registered under the Companies' Acts (*Muir*, 7th April, 1879, 6 R. H. of L. 21). There is only one case I know of in which attempts are habitually made to limit by contract the personal liability of partners, and that is in the case of insurance companies. In these companies which may or may not be under the Companies' Act according as the membership is over or under twenty in number, they insert the provision in the policies that there shall be a claim only on the funds of the company and not on the shareholder. That probably is an efficacious provision for limiting the liability to the stock, and it is recognised for these companies by section 38 of the Companies' Act of 1862; but except in that case, where the business enables it to be done, it is hardly possible to conceive how a partnership liability can, at common law, be limited as to third parties. The common law is absolute; and the liability is unlimited as a general rule.

The second point that I wish to notice with regard to ordinary common law partnerships is, that there is what is called a *delectus personæ* in the partnership—that is to say, the partners are assumed to have gone into the partnership by reason of their confidence in one another, and in the skill and ability of each other. The consequence is, that no one partner can introduce another partner into the concern without the consent of the others; and, to express it in another way, no one, for instance, can assign his share in the company concern to his son, so as to introduce his son into the concern as a partner of the firm. That cannot be done without the consent of the other partners. There is one thing a partner can do; he cannot assign his share, so as to substitute a stranger as partner in his stead, but he may assign the profits coming out of his share while he himself remains a partner. The other partners, however, may treat any such assignation of profits as a good ground for dissolution of the partnership. They may say that they do not choose to continue longer in business with a partner who has divested himself of his interest in the concern.

The third point to be noticed with regard to this partnership

at common law is, that the partnership, the firm itself, has a *quasi* corporate character, a *persona* distinct from that of the individual partners. The consequence is, that the firm, let us say, of John Smith & Co. is regarded as a distinct legal person separate altogether from the partners of whom that firm is composed. The firm may sue one of the individual partners, or one of the individual partners may sue the firm, because they are regarded as distinct persons in law. That is an important and valuable principle of our law, which does not exist in England, or at all events it has not been adopted to the full as yet in England, though I observe in late cases before the Master of the Rolls he has approved of it, and desires it should be introduced in England. At present, however, the understanding is, that the English firm is nothing more than the individual partners. The English firm consists of the partners, and in law the firm's person is regarded as in no way different from that of the individual partners, though there is much difference, particularly in bankruptcy, between the joint or copartnership estate and the individual estates. Say you have the firm of John Smith & Co., the persons concerned in it are just John Smith and whoever else may be the partners, and they must all sue or be sued in reference to the affairs of the firm. That leads to a deal of difficulty and confusion in the English law of partnership, which we avoid in Scotland by this theory, derived from the Roman law, that the firm is a distinct person from the partners—a person capable of having rights and incurring responsibilities altogether apart from the partners. You will observe that while the partnership is a *quasi* corporation it is not a real corporation, because it possesses one curious peculiarity. A corporation duly constituted by Act of Parliament or Royal Charter, such as the chartered banks here, subsists without change as a distinct body, no matter what may be the changes of the shareholders. It is otherwise as to a private partnership, because when one partner goes out of, or another partner comes into, a firm that makes a new firm, and the new partner who comes in and the new firm of which he is a member are not, apart from contract, liable for the debts of the prior partnership. There is a new corporate body formed by the new partner's entrance, and he is not subject to the liabilities of the old firm, though it

may be continued in the old name, unless he has specially undertaken these. Another point is that, though a firm is a corporation, changes of the members composing that firm are of great consequence in regard to guarantees or cash credits granted to or for the firm. It is provided by the 7th section of the Mercantile Law Amendment Act—a provision which has to be kept in mind by everybody in lending money to a firm—"no guarantee, security, cautionary obligation, representation or assurance granted or made after the passing of this Act to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same, in respect of anything done or omitted to be done, after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted or made, or of the company or firm for which the same has been granted or made; unless the intention of the parties that such guarantee, security, cautionary obligation, representation, or assurance shall continue to be binding, notwithstanding such change, shall appear, either by express stipulation or by necessary implication, from the nature of the firm or otherwise." The result is, that a guarantee or cautionary obligation or a cash credit granted for a firm would not bind the debtors in the obligation if there has been any change in the firm after it was granted. If there has been say a partner taken in, or if an old partner has retired, then that cautionary obligation will fall. The principle is that the cautioner has become bound for the firm consisting of certain partners, and perhaps the man who has retired is the very man he trusted to look after the affairs of the concern, and the man who is brought in is the very man he would not like to see in the management of the concern. At all events, the change in the partners alters the obligation; so that anybody holding a guarantee of any sort for a firm must observe that it ceases to be binding when there has been any change among the partners.

The fourth point I wish to notice on this subject is in reference to the name of the firm. Of course, a partnership carries on its business, as a matter of practice,—there is no compulsion in the matter,—under a certain social name. The social name of the copartnery is of two kinds. It may be a descriptive

name, such as the Antermoney Coal Company, the Culcreuch Cotton Company, or the North of England Hematite Company. The firm may consist of two or three members, or of a large number of members; and it may be carried on under a descriptive name. The peculiarity is, that if a firm adopts that kind of descriptive name, the consequence is that it affects the manner in which a firm can sue or be sued. That descriptive name cannot be used in either suing at the instance of the company, or in suing the company, unless you join to it in the summons the names of three individual partners, if there are so many. But that rule of process does not apply to the social name which is not descriptive—such, for instance, as the name of John Smith & Co. A firm which carries on business under a name of that kind, which may or may not be the name of a partner, is different from one with a descriptive name, though the reason for the distinction is not very good. In law that firm is a person just as much as an actual living person is, and it can be sued in that name, or can sue in that name. You simply bring an action in name of or against John Smith & Co., and if you get decree in that name, it is quite settled that you are entitled to charge and otherwise enforce the decree against any of the partners, even though he be not named in the decree. Thus, in the case of John Smith & Co., you can do diligence against Thomas Jones, whose name does not appear in the firm, and who is identified merely as being a partner of the firm, though not mentioned in the proceedings. A name of that kind can be used more freely than a descriptive name in all kinds of written obligations into which a firm may enter. Of course, you need not have "& Co." added to a firm's name at all. There are cases where a company of many partners is carried on in the name of an individual. That is quite a competent course; and if a decree goes against an individual name, that being used as a firm's name, it would be equally binding against each partner, though the partners are not individually named in the decree. When once you get a firm's name established, whether it be descriptive or in the form of the name of one of the partners, that name becomes part of the property of that firm, and no other firm can use that name without an infringement on the right of the holders of it. Because, of course, once you have

an established name with an established reputation, you get a goodwill attached to it which becomes valuable, and to allow that to be taken away by a third party nowise concerned in the firm would be simply to allow the theft of a most valuable asset of the firm. Therefore, any such interference with a firm's name would be prevented. A curious case sometimes happens when a man has in his own name the principal name of an established firm, and starts business in the same line of business, and says on being challenged—"That is my own name: I am entitled to use it. I cannot help it that one of your partners chances to have the same name, and that you have put it into the usual name of your firm." Curious cases of that sort have occurred, and all that can be said is that a man is entitled to the use of his own name, and that, so long as he does not wilfully go out of his way to represent that he is the elder firm, or that he is carrying on their business, he cannot be interfered with. But he must not in any way represent himself as the person carrying on the established business which is known to the public under his name. In connection with that we may notice questions that have arisen about goodwill generally—for goodwill is a matter mixed up a good deal with the name of the firm. Supposing a firm sells its goodwill, it sells commonly, not necessarily, the use of the firm's name by which it has been known. Then the question comes to be whether the parties who have sold this firm's name can again use it. What are their rights? are they to be prevented from establishing themselves next door and carrying on the same kind of business? Well, the rule that has been laid down is that, notwithstanding the sale of the goodwill of the business and of the name of the firm, the seller may establish himself next door in the same business unless an obligation has been taken expressly prohibiting him from doing so. But what he cannot do is that he cannot go to the old customers of the firm, or send his travellers to request their orders, or in any way allege or represent that he is the successor of the firm in its business. Now, these are interesting questions, and it is perhaps as a curiosity that one refers to the case of *Labouchere v. Dawson*, 13 Law Reports Equity, p. 322. In that case, a brewery business had been carried on near Leeds under the firm of Benjamin Daw-

son & Co., and the individual partners thereof sold the brewery, and the plant, fixtures, utensils, and machinery in and about the same, and also, "the goodwill of the brewery business hitherto carried on at the premises in Kirkstall hereinbefore mentioned, and the exclusive right to use the name of Benjamin Dawson & Co., in connection with the business of brewers." One of the partners, named Edwin Popplewell Dawson, established himself in business as a brewer at Burton-upon-Trent, and gave out that his business was "a continuation of the business formerly carried on by the firm of Benjamin Dawson & Co., and also by his travellers and agents solicited the customers of that firm for orders." The purchasers of the firm's name applied for an interdict against his doing so, and the Court at once issued an injunction in these terms,—“to restrain Dawson, his partners, servants, or agents from applying to any person who was a customer of the firm of Benjamin Dawson & Co., prior to the 12th of June, 1871, privately, by letter, personally, or by a traveller, and asking such customer to continue to deal with the defendant, or not to deal with the plaintiffs.” The judge says, “I will specify what appears to me to be the rule in the present case so far as it can be laid down. In the first place, the new firm, the defendant in this case, is entitled to publish any advertisement he pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world to say that he is carrying on such a business, but he is not entitled, either by private letter or by a visit, or by his traveller or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm.” This, however, did not exclude his advertising in the papers so long as he did not send circulars or agents to the customers of the old firm, requesting them to support his business instead of that of the purchasers of the old business. But you see in that case the name of the firm was sold, and he certainly could not be allowed to use that. The only question was, whether, when he had sold the goodwill as well as the name of the firm, he was to be allowed to do anything as to interfering with the old customers of the firm; and it was decided that he was not. This matter of goodwill is one, sometimes of little and

sometimes of much importance to partners. Wherever it is of importance, as in the case of the death of a partner in an old established business, the goodwill of the firm must be sold as much as any other asset of the firm. It may not be of much value, and in some cases it is not; but in other cases it may be of great value, and it is to be considered as an asset of the firm. If there is merely an ordinary dissolution, and all the parties are alive, probably it will not be compulsory to sell the firm's name, because the partners who are alive might thereby be sought to be made liable to the creditors if the business was being carried on in their name; but in the case of the death of one of the partners he and his executors are free from liability; and the rule seems to be that his executors cannot object to the firm's name being sold as part of the goodwill, in order that it may be secured as an asset of the partnership.

The next question is the manner in which the contract of partnership may be constituted—how and in what form can the partnership relation be set up? This is usually done by a contract of copartnership—a regular written deed, which, I think, is very commonly one of the most cumbrous and ill-drawn deeds in our conveyancing. It too often happens in drawing up that deed that the parties are put under a great many minute restrictions not very well adjusted beforehand, and that in practically carrying on the business most of the provisions are found to be too stringent, and they are very often neglected. But the truth of the matter is, that a partnership is never carried on successfully unless the parties continue amicable and on good terms. If you have to enforce articles of copartnership every now and then, by litigation or threats of it, the position becomes dangerous. If the parties come to quarrel as to the meaning of the terms of the contract, there is little hope of the partnership coming to a good result. For my part, I think the best articles of copartnership are the simplest, because they do not tie up the hands of people too much. If the fundamental conditions as to shares of capital, of profit, and as to the duration of the copartnery and the like, are clearly laid down, really so long as people are agreed, and are acting together on friendly terms, I think the fewer detailed restrictions they are under the better. But the ordinary course is to have a regular and formal contract of copartnership with many

stringent provisions. By law it is not necessary to have any writing at all to constitute a partnership relation; you may constitute a partnership to last for a term of years, involving millions, if you like, simply by parole, without a scrap of writing whatsoever. You may also prove a partnership by proof at large—by facts and circumstances such as that a man has been sharing in the profits of the firm, sharing the management of the firm, or has an account as a partner kept in the books of the firm—any circumstance such as these which one may imagine are competent proof that a man is a partner, altogether apart from any written or formal agreement whatever. See, for example, a partnership between two writers so proved in *Morrison v. Service*, 1 July, 1879, 6 R. 1158. The partnerships that are usual are those, first of all, for a term of years, say for five or for ten years, during which term the partners are bound and cannot get free from one another save in one or two specified cases. Then another kind of partnership that often occurs is a partnership merely at will, where the partners do not bind themselves to any term of years, but simply carry on business during pleasure. A partnership of that sort may be put an end to at the pleasure of the partners. There may be a third variety—when, for instance, a man or two men have taken a lease of minerals for a period of years, and they go into a partnership as coalmasters without a written agreement and without saying how long the partnership is to continue. Well, the law on the subject is, that they are not thereby bound for the whole duration of the lease. It does not follow that because the lease is for, say, nineteen years they are partners for the nineteen years; but the duration of the lease will be an item towards proving, in the absence of a contract, that they intended to be bound during its currency, and in any event it will be held to show they intended to be in partnership for some considerable time. Another result of the absence of a written contract is, that the partners will be held equally interested in the profits and losses of the firm, unless proof be adduced to the contrary (see *Aitchison*, 16th June, 1877, 4 R. 899). One of two joint-tenants in a farm may, notwithstanding the terms of the lease, prove by parole that his share of stock and profits, and his liability for losses, was more or less than half.

We now have got partnership constituted, and you will

observe that, in the definition with which we started, we said nothing about capital—about the funds that are to be provided for carrying on the partnership. The reason of that was that it is not essential to a partnership that there should have been funds provided. It is possible that a partnership may occur in which no capital has to be provided: that might occur well enough in the case of a professional partnership, as between two surgeons—a thing common enough in England; or here, between two solicitors. Still it is certainly the usual and general case that capital is to be provided; and the amount of capital to be provided is stipulated by the contract, and so are the shares in which it is contributed by the partners. The partners are also, in the absence of any arrangement to the contrary, bound, besides supplying the capital, each and all to attend to the business, and to devote their best time and attention to carrying it on; and that obligation also contemplates and implies that a partner is not entitled to demand salary for his services to the firm, because that service is part of the obligation he incurs to his partners. You may regard that last remark as a little strange, because there is no provision of a contract of copartnery more common than that the profits shall accumulate, and that the partners shall draw salary of a certain amount. Of course, where that occurs the salary is due; but what I am showing is the state of the common law in the absence or silence of a written contract as to salary. As to the manner in which the accounts are to be kept for the capital, and for any advances that may have been made by the partners beyond the capital, we must distinguish between the two. Suppose a sum is fixed as the capital of the firm, and contributed by two partners, but that in the course of the business they make advances to the firm beyond the originally agreed-on capital: these advances are debts due by the firm and the other partners to the partner who makes them, to be paid as debts of the concern after third parties are paid. With regard to the keeping of the firm's accounts, the manner in which the thing is to be arranged is this: The losses are to be taken in the first place out of the profits. Then, if there are no profits at all to be set against the losses, the capital must be drawn upon to meet the losses of the firm, for which the partners are liable. As regards third par-

ties, the liability is unlimited; and in regard to each other, they are liable to contribute in the proportions that may be fixed in the contract, or, failing that, in the proportions of their shares of the business. On a dissolution, then, the funds are in the first place applied to pay the debts of the firm; then anything that remains is to be applied to repay advances by the partners, as distinct from capital; and then, in the third place, the original capital of the firm is to be paid up in full from the fund for division; and if anything remains after these three things have been paid, it is to be divided among the partners in the same way and according to the shares in which they are entitled to the profits of the firm. Thus, you know, it may well happen that a man has three-fourths of the capital, and is entitled to only one-fourth of the profits; so that the surplus must be divided, not in proportion to the shares of the capital, but in the proportion in which he and the other partners are entitled to the profits.

The capital which has been contributed by the partners, is often put out in permanent purchases. It may be expended, say, on the purchase of a house for carrying on the business of the firm, a manufactory, or a mill. Well, there is one peculiarity of that matter in our law that may be noticed—namely, that the title to heritable subjects cannot be taken in name of a firm, it must be in the name of the partners, individually, as trustees for the firm. It is a very simple matter to do that; but a difficulty often occurs when one partner has held the title to the property of the firm in his own name, and the title does not bear that he does so as trustee for the firm. At his death the question often arises with his representatives—is this property really his property; does it really belong to the firm, or does it go to the partner's heirs? Well, our law on that matter, as a general rule, lays down that the alleged truster cannot prove a trust except by a writing or by the oath of the alleged trustee, and that rule accordingly restricts very much an attempt to show that the title held *prima facie* in a man's name absolutely, is really held by him as trustee. In a case of partnership, however, that may be proved in a proof at large. A curious case of that kind occurred lately where a firm had obtained a loan, and, in security, had given out an insurance policy in the name of the junior partner. They

paid the premiums; the partner died, and his executor, after paying his debts, found a large balance arising from the policy, which he claimed as part of the deceased's private estate. The Court held that there the other partners were entitled to prove the trust for the firm by a proof at large and not by writing only. That was the case of *Forrester v. Robson's Trustees* (2 Rettie, p. 755), in which Lord Ormidale said—"I concur with your lordships in opinion that the Trust Act does not apply to this case. It was admitted that Robson was a partner of Forrester & Robson. It is admitted also that the object of the policy was to enable Forrester & Robson, and Cowie & Sons—who, I think, must be taken as joint-adventurers with Forrester & Robson in this matter—to obtain a loan. Robson's representatives cannot maintain that because the policy was in his name it was his property. It is clear, I think, that it was not; and, indeed, it was not disputed that it could not be so long as the purpose for which it was obtained was not fulfilled." And the Lord Justice-Clerk says—"With regard to the competency of the proof, where the allegation is not trust, but partnership, the Act 1696 does not apply. The fact that a partner holds on behalf of the company, may be proved *prout de jure*." That is to say, it may be proved by a proof at large; and, even with regard to heritable property, the result is the same. If you find entries for rents received and for repairs to the property in the books of the firm, or if the property is in any way mentioned in the balance-sheet, that will be generally conclusive proof that the heritable property is really the property of the firm and not of the individual partner in whose name it may chance to stand. So that, in that manner, a copartnership has considerable privileges in the way of showing that property bought with the funds of the firm belongs to them, though the title appears to exclude them.

Another thing to be remarked, leaving these matters which are somewhat technical, is that partners are simply agents for their firms and for their co-partners in all matters relating to the company's business. You know we were dealing with the relation of principal and agent on one or two previous occasions, and that discussion helps us to pass briefly over this peculiarity of the partnership relation, namely, that partners

stand in all respects, at least as to the management of the business, under liabilities and responsibilities as agents for the firm. They are bound to good faith as agents and to one another; they can take no personal benefit except partnership profit out of any matter in which they act for the firm; they must hand in all commissions or discounts to their copartnership. Moreover, if for instance one partner carries on, for his own behoof, a branch of business falling within the business of the firm, on his other partners discovering that he will be bound to give up the profits he has accumulated; for a partner is not allowed to compete with his firm in the line of the firm's business. With regard to the powers of partners as agents of the firm these are frequently the subject of limitation and stipulation in the contract of copartnership. These deeds are binding on the partners, and the partner who violates them will be liable in reparation to his copartners; but as to third parties we may lay down the rule almost absolutely that a partner is an agent for his firm to do everything that is usual and necessary in the particular business which the firm carries on. The third party has no need to ask as to any special powers that may have been committed to the partners as agents. So long as he transacts with a partner in the usual way, and in the ordinary business which the firm carries on, he is safe. He is dealing with a party held out to the world as having power to transact, and all acts of the partner in the usual line of business will bind the firm even though there may be a private stipulation between the partners that the partner acting is not to bind the firm in that particular way. Of course if the third party should chance to know that the partner is wrongfully exercising his power for his private behoof—for instance, granting a partnership bill and putting the money in his own pocket—there is no recourse against the firm; but as a general rule as to the usual business of the firm with third parties, each partner binds the firm though he be exceeding the powers given to him by contract of copartnership. Each partner has power, according to the exigencies of the business, to grant bills, to buy goods, to sell goods, to borrow money, to receive and uplift the debts of the firm, and to discharge these. These powers are held to be given by the fact of partnership, because they are in general

necessary for the conduct of almost any mercantile business. Where they are not necessary, as may happen in a limited joint-adventure, they do not exist, particularly as to binding the joint-adventure by bill debts. These are the general powers of a firm, and of any partner of a firm. But there is one thing a partner cannot do. He cannot grant a guarantee or cautionary obligation, signing it with the partnership name, so as to bind the firm. As a general rule, that is not in the power of a partner. In the same way, as with other agents, a partner will bind the firm not only on contracts but by his wrongful acts in the conduct of the firm's business. If he make fraudulent representations, or otherwise in carrying on the business of the firm, causes damage to any person, the firm will be liable in reparation just as any other principal is liable for an agent. And in the same way if a partner in the ordinary course of business gets money from a third party into his hands which he misappropriates, the firm will be responsible for it, supposing always that the money has come into the partner's hands in the usual and ordinary business of the firm.

The only thing to be noticed now, before concluding, is the dissolution of the firm. The first and ordinary circumstance by which a firm is dissolved is simply the expiry of the term of years for which it was agreed to carry on the business; and that needs no application to the Court. In the case where a firm has been established absolutely at the will of the partners, then at the will of the partners the firm may be dissolved, on giving anything like reasonable notice. If notice were given in a fraudulent way, the Court would not sustain it; but, as a general rule, reasonable notice is enough. Another thing that dissolves a firm at once is the death of one of the partners. The marriage of a female partner, too, equally dissolves the firm. If a lady has been a member of a firm, and has been married, she ceases to be a partner, on the principle that she has assigned her share of the partnership to her husband, by virtue of the *jus mariti* of her husband, and that the other partners are not obliged to admit the husband, and are entitled to dissolution. The effect upon this rule of the Married Women's Property Act of 1877, 40 & 41 Vict. c. 29, remains yet to be decided. Then, the sequestration of a firm dissolves it; and so with the sequestration of a partner—it

would operate as an assignation of his share to his trustee, and so entitles the other partners to a declaration of dissolution. In all these cases the dissolution has effect with the mere occurrence of the event; but there are some other events of a more delicate character, in which the partners can get dissolution only by applying to the Court. The first of these that may be noticed is the case of the insanity of a partner. That is a difficult matter that may occur; and in that case the remedy is to apply to the Court to have the firm dissolved and wound up. Then, again, there is misconduct. It sometimes happens that a partner conducts himself, by drinking, or by dissipated habits, so as to cause discredit to the firm and bring it to risk of ruin. Such cases are the most difficult to be dealt with in a lawyer's practice; but the partners must show misconduct to the risk of ruining the business, spoiling the credit of the firm, and almost stopping the business. In that case an application must be made to the Court. Insolvency of a partner may also be a ground for judicial dissolution, and it is commonly provided for by the contract, as in *Hannan*, 16th December, 1879, 7 R. 380. Another case is where it is found impossible to carry on the partnership with profit—where carrying it on will involve loss and damage to all concerned. One of the partners who can make out a case of that sort is entitled to go to the Court, and on showing that, he can get the firm dissolved. You would think that is a case that would not often require judicial interposition; but it was so in the case of *Miller v. Walker* (3 Rettie, p. 242). Two persons went into a joint-adventure to work certain mines in the north, which they leased for nineteen years. After carrying it on for some time, one of the partners saw there was to be no profit made; and he applied to the Court and got the firm dissolved, the rule being laid down thus:—"The general rule is that one of two joint-adventurers is entitled to put an end to the joint-adventure if it comes to be attended with greater risk than when the contract was entered into, or if there be no reasonable belief that profit will be made for either party." And on the facts of that case the Court held that there had been a reasonable trial made of the minerals, that there was no prospect of profit; and that the partnership could be put an end to.

In connection with these matters I must ask your attention to this. In cases of dishonesty or misconduct, or where there are questions or disputes with regard to the management of the firm, the partners who are objecting and seeking the remedy of dissolution cannot take the power into their own hands. The majority must apply to the Court, the condition always being that the partner against whom they make complaint must be heard. Nor can the majority of the partners alter the nature of the business at their pleasure against the will of even one who adheres to the letter of the contract. Supposing they start business as insurance brokers the majority cannot change to another business, nor do anything to alter the fundamental terms and constitution of the firm.

Now that we have considered how dissolution may be brought about, the only question which remains is, as to who is to wind up the firm. There are one or two rules as to that. In the case of death of any of the partners the only persons having a right to wind up the firm are the surviving partners. The representatives of the deceased are merely creditors who are entitled to demand that the firm's affairs shall be wound up by sale of the assets, and that their share shall be so ascertained and paid to them, unless by the contract special provision is made, as is usual, that the business is to be carried on by the surviving partners who are to pay out the representatives of the deceased as at the last balance by fixed instalments. In the absence of any express provision, at common law, the surviving partners are the only persons entitled to manage the business and wind it up. But in the case where all the partners are alive, they are all alike parties to wind it up. On the marriage of a lady who has been a partner, the other partners wind up and pay her share as in the case of death (*Russell*, 2 R. 93). These questions are often of consequence. The Court will not in the case of death take the winding up out of the hands of the surviving partners unless something approaching a case of fraud is made out against them. Where all the partners survive, the Court only appoints a judicial factor with difficulty where the parties will not or cannot act together, and affairs come to a deadlock. In England the matter is more largely dealt with, and the Court appoint an officer to wind up a firm almost as of course, or at least in any case

where there is reasonable dissatisfaction with the proceedings of the parties called by common law to wind up (*Gow*, 4 R. 928).

Another point is, that a partner upon a dissolution has an absolute right to insist on the sale and division of the whole assets. A retiral on the terms that the retiring partner is to be paid out by the remaining partners must be matter of special arrangement either in the original articles of the copartnery or at the time of retiral. If there is no such special arrangement, and a man goes out of a firm on any of the grounds already noticed, there is a dissolution at common law, and under that any partner may insist on the whole company's assets being sold and divided among all the partners. So that when one partner dies his trustees are entitled to insist on a sale; and the surviving partners are not entitled to carry on the business and pay the executors out, if the executors will not agree to that, and there is no provision for it in the contract. In the sale of the assets we have already seen that the goodwill must be included. There is just this further rule to be observed, that as the goodwill is to be included, no one of the partners is entitled to go behind the back of the others and take a lease of the company's premises and so gain the advantage of carrying on the business in the old place. If he goes without telling the others and procures a lease and so attempts surreptitiously to continue the business for his own behoof, his acts will accrue to the benefit of the other partners. A curious case of that kind *M'Niven v. Peffers* occurred in reference to a public-house business (7 M. p. 181). A partnership carried on a public-house business for seven years, and the lease was in the name of one of the partners. At the dissolution of the firm he went to the landlord and got a new lease in his own name, and continued the business in the same premises; but on application to the Court by the other partners it was found "that in the foregoing circumstances the foresaid renewed lease must in law be held to have been obtained by the defender in his own name, subject to a trust for said copartnery, and must now be dealt with as belonging to the said copartnery, and that the pursuers are entitled to a share, corresponding to their rights and interest in said copartnery, of the profits of the business or trade which has been carried on by the

defender in the foresaid premises in Gallowgate, Glasgow, for the sale of wines, spirits, and other liquors, since the term of Whitsunday, 1866, or that may yet be so carried on by him aye and until the utensils and stock-in-trade, and other property and effects, including the goodwill of said business and the foresaid renewed lease, shall be sold and realised for behoof of the pursuers and the defenders as jointly interested therein, or until a settlement or arrangement is otherwise effected." That, you see, is just another illustration of the rule that runs through principal and agent, and through partnership—that perfect good faith must be observed as between the parties, and that no one is to be allowed by underhand dealings to take advantage of the other.

LECTURE IX.

PARTNERSHIP.

WE are to discuss still further the subject of Partnership; and the first point that I wish to bring under your notice is that a man may become liable as member of a partnership, although he is not really such, by being held out as a partner. If he allows himself to be represented as a partner in a firm, and the creditors act on that holding out or representation, then he will be liable as a partner, to third parties, for the whole liabilities of the firm; he will be liable simply on the equitable principle that he has acted in a manner to lead others to suppose that he is a partner. If he has by words or conduct held out or represented that he is a partner with the intent or in such circumstances that a reasonable man might reasonably assume him to be a partner, then anybody who acts on such representation will be entitled to hold him liable as a partner. But it is only people to whom such representations have been directly made, or to whom they have been warrantably communicated, who can take advantage of such holding out, so as to make a man who is not really a partner liable to them as if he were such. To become liable in this way a man must, by his own words or conduct, have held himself out as partner, and the person claiming upon him must have been thereby misled into trusting the firm on his credit. It will not suffice for this kind of liability that a creditor shall have trusted the firm and afterwards learn that the person sought to be made liable had at one time held himself out as partner. Moreover, a man so liable as a partner by having held himself out as such would have a good claim of relief against the real partners for any payment which he might be compelled to make to third parties on their account *Mann*, 20th June, 1879, 6 R. 1078. This subject of estoppel

by holding out is discussed with much acuteness, but in a way which requires, for practical guidance, further distinctions as to duties arising universally and those arising from special position or contract in the case of *Carr*, 10 L. R. C. P. 307.

A more important class, who are held liable as partners, is that called dormant or sleeping partners; and to their case we shall now turn in the second place. A sleeping partner in a firm is a person who takes no active share in the management of it; he is not ostensibly, as regards the outer world, a partner at all; he is in the position, in short, of an undisclosed principal—a man whose name is not known to the outer world, but who turns out on inquiry to be really in the partnership, and interested in the business carried on by the firm. A person in such a position will, in the case of an express contract of copartnery to which he is a party, be liable beyond a doubt. That is to say, if there is a contract of copartnery between A, B, and C, that there shall be a firm made between them, but that C shall have no direct or personal share in the management of the firm, and shall not appear publicly to the world as a partner; nevertheless, on that contract being disclosed, the creditors have the right to go against C just as much as if he had been an active and ostensible partner. C is thus in the position of a sleeping or dormant partner. This, however, is a comparatively simple case, where the contract between A, B, and C specifies that C is to have the rights and privileges of a partner, *inter socios*, though he is not to be disclosed to the public as a partner. The case which more usually occurs is where there is no express contract, or a contract intended purposely to avoid the liabilities of a partner on the part of a sleeping partner. A very common case is that of a father who advances capital for his son, and who perhaps retires from the business, stipulating that a share of the profits be paid to him by his son in respect of this capital. Another very common case is that of a confidential clerk who receives a share of the profits in return for his services to the firm. With regard to such cases as these the question arises, and it is often one of difficulty, whether such persons, though not ostensibly partners, are to be held liable as partners to third parties. The common law rule used to be that if you found a man entitling himself by agreements with an ostensible partnership to a share of the

profits of the business, he was liable to third parties as a partner, even though they might never have heard his name or trusted to his individual credit. The established doctrine was that a man who shared the profits of a firm was liable to third parties as if he were a partner, almost without further inquiry. That was the doctrine that was formerly established; and it was applied even to the case of clerks or managers who stipulated for their payment in the shape of a share of the profits. People who did so, the law was thought to hold, were partners, just on the hard and fast mechanical rule that a man who took a share of profits must necessarily incur the liability of a partner, even though he were not ostensibly a partner, to third parties. In order to correct that view of the law, the Act 28 & 29 Vict. cap. 86, commonly known as Lord Chief-Justice Bovill's Act, was passed in 1865, and, as it is an Act of considerable consequence, I shall be excused for referring to its provisions in detail. The first provision it makes is this—"The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such." That section of the Act was passed to prevent what was imagined to be a hardship, arising out of the mechanical way in which the common law rules were being enforced. These rules were being interpreted as meaning that anybody who took a share of profits as such would be held to be a partner, almost without inquiry. That was, at all events, believed to be the state of the law as at the date of this Act; and, accordingly, a man who lent a sum of money to a partnership, with the stipulation that he should receive a share of the profits in lieu of interest, would certainly have been held, prior to this Act, liable as a partner to third parties, although his real intention may only have been to be a lender to, and creditor of, the firm. This clause provides that merely giving a loan of money to a firm, on condition of receiving a share of the profits in lieu of interest, should not of itself make a man a partner. If there were anything more, if he acquired control

of the business, such as a partner usually has, and stipulated for a share of the management, that might make him liable; but the provision is that if he merely receive a share of the profits in lieu of interest, that itself shall not make him liable as a partner. The condition of getting this protection is that the contract must be in writing; and the further condition is imposed in section 5 that, in the event of a firm or trader to whom the party has lent the money in return for a share of the profits becoming bankrupt, the lender shall not be allowed to rank on the estate till after all the other creditors have been paid. That first section was intended to protect a class of persons who might otherwise have been held liable as sleeping partners. Another section of the Act gave further protection. The second section applies to the case of clerks, servants, or agents. It provides—"No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner." The third section relates to the case of a widow or child of a deceased partner. It enacts—"No person, being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader." And section 4 provides in the same way—"No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business." The privilege of being free from partnership liability in the cases mentioned in this Act is conferred under the heavy limitation and disability that the lender or vendor of goodwill shall not rank upon the insolvent estate of the trader or partnership until the claims of all other creditors have been satisfied. So you see that Act was intended to relieve persons from liability as sleeping partners on the ground that they shared in the profits of the firm; and its general meaning is, that a lender, a clerk or servant, a widow or child of a partner, or a seller of

goodwill, shall not be liable as a sleeping partner solely on the ground that he or she shares in the profits of the firm. In order to make a person liable in any of these circumstances—to take him out of this Act—you must show something else than merely that he has shared the profits of the business. Now that is the Act that was passed; and an instructive case occurred in 1876 relating to it, that of *Pooley v. Driver*, 5 Ch. Div. 458. It was the case of a bargain that was held not to be under the Act. Two persons established themselves in partnership, having the capital of the firm stated as £30,000. They advanced so much of it themselves, and the remainder of the capital was to be advanced in sums of £500 by anybody who chose, the condition being that the persons who advanced each £500 should have a share of the profits in proportion to their advances. That would have been in terms of the Act; but, moreover, it was provided that the persons who advanced that money should have right to inspect the company's books, to call for accounts, and that the money should only be payable at the end of the partnership, whensoever that might be, and that at the end of the partnership, if it was found that the profits they had got were more than the firm could really afford, they should be bound to repay a share of the profits. What I call your attention to is, that the bargain in this case was more than the Act allows. It was not merely the case of a person who has been lending money and receiving a share of the profits; but it was stipulated on behalf of the lenders that they should have a share in the supervision of the concern, the right to inspect the books to see what was going on, the right to see that the capital was being applied profitably, and they undertook that they should not call up their money till the end of the partnership, and should then refund what they had received if it had been an ultimate loss. It was a most ingenious device; and the meaning of it was, that the parties wished to take the profits of the partnership without incurring any liability as partners. That case came before the Court, and the Court, represented by the Master of the Rolls, had no hesitation in saying that a bargain like that was not protected by the Act. There had been a stipulation for a share in the management; and by reason of that condition the Court held that the lender of the

money really and truly was a dormant partner, and not a mere creditor of the firm, and that accordingly he was liable to the copartnery creditors as such. The Master of the Rolls remarked: "I must say I have come to a clear conclusion that this is not a transaction of loan within the meaning of the Act of Parliament; that the true relation of the parties towards one another was that of dormant and active partners, and not of mere creditors and debtors; that in this case I need not rely on one provision or two provisions, but on the whole character of the transaction from beginning to end. It is an elaborate device, an ingenious contrivance, for giving these contributors the whole of the advantages of the partnership, without subjecting them, as they thought, to any of the liabilities. I think the device fails; and that looking at the law as it stands, I must hold that they are partners, and liable to the consequences of being partners, and to the whole of the engagements of the partnerships, and, consequently, liable for the whole of its debts." So that you see, that in order to get the protection of this Act, the lender, clerk, widow, or child, or seller of goodwill must be careful that the bargain contains nothing more than a provision for a share of the profits. If the bargain goes beyond that, and stipulates for anything amounting to a share in the management of the firm; if the bargain shows that the business is being carried on for behoof of the supposed lender, then he will be liable as a latent partner to the creditors of the firm. I have had occasion in practice to consider a case of this kind, where the managing-clerk of a firm had not only lent money to the firm, but had also stipulated for a share of the profits, both in respect of the loan and of his management. In other words, he claimed profits by contract under both the second and third sections of the Act. He was thus both managing the firm for a share of the profits and advancing capital for a similar share. It was difficult to find in what way his position really differed from that of a partner, and he did not appear to be entitled to the protection of the Act. Accordingly he was held responsible as a partner, as if the Act had not passed. Nor can there be any doubt that, supposing the Act to be a limitation or correction of the common law of partnership, the only contracts which are protected by it are those which fall strictly within one or other of

its sections; and it is so peculiarly expressed that special provisions added to the precise nature of the contract indicated in each of its sections, may readily take the whole contract out of the Act. It does not follow, however, that a contract which cannot be placed wholly under any of the sections of this statute will involve liability at common law. It has turned out, very curiously, that this Act of Parliament has been founded on a mistake as to what the common law really was, because in the leading case of *Cox v. Hickman*, 8 House of Lords Cases, p. 268, the common law has been declared to be this—that the mere sharing of profits, though an element of proof that a man is a partner, is not to be taken as conclusive proof. If you wish to show that a man is a latent partner, it is relevant evidence to prove his sharing the profits of the business; but still it is open for him to show that he shares on another footing than that of being a partner, that in reality and truth he is only a creditor. In that case the circumstances were that a firm had become insolvent, and that its creditors had obtained from the partners an assignation of the company estate. The firm was to carry on the business under the supervision of the creditors; the profits were to be applied towards paying them; and upon their debts being paid, the firm's assets were to be retransferred to the debtors, to the firm itself. This scheme of liquidation under supervision did not succeed, and a subsequent creditor of the firm attempted to make the original committee of creditors liable as partners, on the ground that they were sharing in the profits. The House of Lords, however, after a great division of opinion among the consulted judges, ruled that the mere sharing of profits in this case was not conclusive that this committee of creditors were partners. It shows, no doubt, they were to enjoy the advantages of the business, but it does not show that the business was to be carried-on on their behalf and account—that they were principals in the business. The substance and reality of the transaction, as the Court held, was that it was the firm and not the creditors that was carrying on the business under supervision; that the creditors had only a right of security over the profits; and that the profits were only to be applied to payment of the debts by virtue of this security, and therefore that the committee were not to be held as partners of the firm. The rule, therefore, is that sharing of profits is not

conclusive in any case—that it merely leads to the presumption that a man is a partner, but that he may show he got his profits on terms different from those of being a partner at all. He may show that he was not a principal, that the business was not being carried-on on his behalf, and that he was really getting the profits for payment of his debts. The same thing was decided in the Scotch cases of *Eaglesham Co.*, 15th July, 1875, 2 Rettie 960; and *Stott*, 20th July, 1878, 5 R. 1104. The case of *Cox* has shown that this Act was probably unnecessary, that the common law was not so strict as was imagined, in respect the sharing of profits was not conclusive as to partnership, independent of the Act, and that the state of the law, apart from the Act, is just as it was put by the Master of the Rolls in the case of *Pooley*. It may be stated in his own words—“If we find an association of two or more persons formed for the purpose of carrying on, in the first instance, or of continuing to carry on business, and we find that these persons share between them generally the profits of that business, as I understand the law of the case, as laid down by the highest authority, these persons are to be treated as partners in that business, unless there are surrounding circumstances to show that they are not really partners.”

The common law, as now interpreted, would apparently have given all the protection that is given by that Act, and the Act possibly has only the effect of imposing limitations and disabilities, in competition with other creditors, on the persons who fall under its provisions. As now understood, the common law leaves the question whether the person who is entitled to a share of profits is a partner, to depend on what was the real contract between the parties. After the case of *Cox*, that is the state in which the law stands. You are to inquire what the real contract is, what is the substance of the bargain. If the share of the profits really arises from the person who gets the profits being a principal in the business, if the business is really conducted on his behalf, then he is a partner; but if he can show that he shared in the profits only as a creditor, or in liquidation of a debt, then he will not be liable as a latent partner. The same principle has been followed in some curious cases, for instance in that of the Indian Rajah *Mollwo*, 4 L. R. P. C. Appeals, p. 419. There an Indian rajah had agreed

with an Indian firm to advance money, on condition that he should get a certain commission on the profits. The firm failed, and it was attempted to make him liable as a partner; but the Court held that the question must be, what was the real relation between them. Although the rajah was to get a share of the profits, was he really in the position of a partner? The Court decided that, according to the real meaning of the contract, the firm was to carry on the business independently, and that he was merely a creditor; and he was held to be free from the debts of the firm. There are many other cases, such as *Tennant*, 6 Ch. Div. 303, on this subject which I would very willingly go over with you; but it is impossible, in the time we have, that I should pursue the subject in all its details, and I confine myself to the broad results. The state of the law under the Act, and the common law, now is that the sharing of profits generally raises a presumption against a man as a latent or dormant partner of a firm, but that he will be entitled to show that the actual contract was not a partnership contract. He may show, in any competent form, such facts as that he was not really a partner, that he was not truly the principal on whose behalf the business was carried on, or that he was a creditor of the firm with only limited powers as such. If he can present such a case, he will be clear of liabilities as a partner; but if he can make no such explanation of his sharing the profits, and if, as in the case of *Pooley v. Driver*, it be shown that he is really and in substance a partner, and that the business is carried on for his behoof, that state of matters is conclusive, and he will be liable as a partner. In short, in the present state of the law, a man shall not be liable as a partner unless he has held himself out as such, or has, by the substantial terms and meaning of his contract, made himself truly and to all effects a partner with those carrying on the business.

The matter to which I wish to draw your attention, in the third place, is that of novation. You will understand, of course, that when a firm is constituted it is only the partners of the firm during the time of its existence who are liable for its debts. If a new partner is taken in, or an old partner retires, a new firm is made; and the new firm is alone liable for its proper debts during its existence; it does not incur any lia-

bility for the debts of the previous firm. I explained to you before, that there was a quasi-corporation formed in Scotland by every copartnership, but that, on the death of an old or the joining of a new member, a new quasi-corporation was formed. I wish you now to understand that the partners of a firm are liable for the debts of the firm only as it existed, or while it existed. For instance, if there is a firm, and they take in their head-clerk as a partner, he becomes liable only for the debts that accrue during the existence of the new firm of which he is a member. The new firm may, if it please, assume liability for the debts of the old firm; but that is a matter of arrangement between themselves. As a matter between the new partner and the old members of the firm, the arrangement that the new partner or the new firm shall take over the liabilities along with the assets is so common that it will be easily believed and proved to have taken place. In this, however, as in all other partnership questions, there are always third parties to be considered, and an arrangement for transference of liabilities *inter socios* will in no way necessarily affect the rights of those who were creditors prior to the change in the firm. A creditor of the old firm is not bound to accept the new firm's obligation for the debts of the old firm. He may take up the position—"I do not care what you arrange; I insist on the liability of my proper debtors, the old firm, and I refuse to accept the new firm as debtors in its stead." Even, perhaps, in Scotland he may go so far as to say—"Since the new firm has taken over the whole company estate of my old debtors the new firm shall be liable to me on that ground; but I will not give up my claim on the old firm." The creditors of the new firm will have right only against the new firm, and not against the old firm at all. But it is a very common thing, when one partner of a firm retires, or the firm is in any way reconstituted, to state in an advertisement that the business will be carried on by the partners of the new firm, who will collect the debts and pay the liabilities of the former copartnery. Though that is done, and the new firm has arranged with the former partners to discharge the debts of the old firm, an arrangement of this sort is not binding upon the former creditors unless they consent to it. The creditors, though such notice be published, will not be bound to take the

new firm as debtors; they still may claim against the old firm. But it may be that the creditor takes a bill from the new firm, and gives a discharge to the former copartners. If he does that, there is no further question; he has discharged the old firm—and there is no difficulty in that case at all. The difficulty arises—and that is the necessity for the doctrine of novation—when there have been dealings with the new firm, or the acceptance of an obligation of the new firm, and nothing has been expressly said as to discharging the old; but the partners of the old firm urge that after what has been done by their creditor with the new firm the old firm is virtually discharged. The doctrine of novation is to ascertain and fix the conditions on which a discharge may be justly held to have been given to the old firm by accepting the obligation of the new firm in place of the old debtors. The doctrine of novation, derived from the Roman Law, is simply this—If I have a debtor, that debtor may, if he choose, arrange with a third party to undertake the debt, and even I may take the obligation of this third party; but that will not necessarily discharge the original debtor. I may have accepted this new debtor truly as cautioner or collateral obligant for the original debtor. In order to novation it would need to be shown that by some acts on my part I have, by the necessary and reasonable construction of my proceedings, consented to give up the right to go against my old debtor. If there is any doubt as to the terms under which the obligation from the new debtor has been taken it will be held to be merely an additional security, and without prejudice to the continued liability of the original debtor. The law is stated in the clearest possible manner in *Erskine* iii. 4, 22—“Delegation, which may be accounted a species of novation, is the changing of one debtor for another, by which the obligation which lay on the first debtor is discharged; *e.g.*, if the debtor in a bond should substitute a third person, who becomes obliged in his place to the creditor, and who is called in the Roman law *expromissor*; this requires not only the consent of the *expromissor*, who is to undertake the debt, but of the creditor. For no debtor can get quit of his obligation without the creditor's consent, except by actual performance; and no creditor can be compelled to accept of one debtor for another against his will. Neither novation nor delegation is to be

presumed ; for a creditor who has once acquired a right ought not to lose it by implication ; and, consequently, the new obligation is, *in dubio*, to be accounted merely corroborative of the old." So that, for instance, in the case in which a new firm has advertised that it is to collect the debts of the old firm and to pay its liabilities, when you find a creditor of the old firm taking a bill for his debt from the new firm the question arises whether that is to be construed as a discharge of the old firm, or merely an additional obligation for the debt. Failing payment by the new firm, can the creditor go back upon the partners of the old firm ? It is for cases of that sort that the doctrine of novation is required ; and you see it is laid down by Erskine that novation is not to be presumed. The mere taking of a bill from a new debtor will not discharge the old debtor. That has been found in a number of cases, as in *Muir*, 16th May, 1860, 22 Dunlop 1070 ; *Anderson*, 21st March, 1865, 3 Macph. 727 ; and *M'Intosh*, 10th January, 1872, 10 Macph. 304. In the last two of these cases the creditor had actually taken a bill from a new debtor. The bill had not been paid ; and then the creditor, taking recourse upon the old debtor, was met by the plea that he had accepted the new debtor in place of the old debtor, and had so discharged the latter. In both those cases it was held that the mere taking of the bill from a new debtor was only to be construed as taking additional security, and did not free the old debtor. The case of a firm which has announced that it has taken over the business, and is to collect the debts and pay the liabilities of an old firm, has also occurred for decision ; and even in that case the taking of a bill from the new firm has been held not to discharge the old firm, as in the late case of *Pollock & Co. v. Spence*, 6th November, 1863, 2 M. p. 14. There a creditor had an account against the firm of Murray & Spence, and this firm sold their business to a man named Fullarton, and announced in the newspapers that Fullarton would pay the debts of the old firm and collect the liabilities. Pollock & Co. got partial payment of their debt from Fullarton, and took his bill for the rest. That bill was not paid, and the creditors then sued Murray & Spence, the original creditors. The Court of Session held that there was no novation. Lord Curriehill said—"There is no doubt that the relation of debtor and

creditor was constituted between the pursuers and defenders"—that is to say, between the creditors and the old firm. "The obligation of the debtor [the old firm] must, therefore, be performed, unless it be shown by him either that the debt has been already paid, or that, with the consent of the creditor, the debtor has been discharged of his obligation. It is clear the debt has not been paid, nor is there any allegation on record that there was any transaction whatever between the creditor and the debtor. All that is said is, that a bill was granted for the debt by a third party. The presumption of law, however, is, that a third party interposing does so as an additional security, and the evidence in this case entirely confirms that presumption." The Court went a good deal on the terms of the notice. Fullarton had undertaken to "receive payment of all the debts due to, and discharge the obligations of, the late concern;" but as to whether he was to act as an independent obligant or only as agent of the old firm in this matter was regarded as doubtful. That case is a very strong illustration of the difficulty in proving the two points of novation, viz.—(1) the acceptance of a new debtor, and (2) the discharge of the old. It shows that a bargain between an old and new firm that the new firm takes over the debts, though that is very distinctly made, will have no effect upon the creditors; nay, that though a creditor takes a bill from the new firm, that will not discharge the old firm. It is not enough to take the obligation of the new party; there must be some act on the part of the creditor, something to show that in all reason and fairness he took the new debtor entirely in room of the old, and discharged the old. Nothing short of the creditor's consent to discharge the old debtor, expressly given or reasonably and fairly implied by the creditor's words or conduct, will suffice to establish novation. Now, what would constitute implied consent to the original debtor's discharge by novation it is difficult to say; and our law appears to be more stringent in the application of the doctrine of novation than the law of England is. It seems, however, that novation should be held to have occurred where, in addition to accepting the obligation of a new debtor, there is such conduct on the part of the creditor as amounts to a holding out or representation, on which the original debtor

might reasonably act, to the effect that he was discharged. There is one case in the Court of Session, a decision of the last century (*Buchanan*, Morison's Dict. 3402), where the old firm announced, as in the case of *Pollock*, that the new firm was to pay their debts, and take over their liabilities. A creditor signed a receipt for his debt to the new firm, and took a bill from the new firm alone. The bill was not paid, and he wanted to claim from the old firm, but the Court held that his giving a receipt and taking a bill implied that he accepted the transference of the liability to the new firm, and that the old firm was discharged. Another case has occurred as showing this—*Pearston*, 18th December, 1856, 19 Dunlop 197. A man sent goods to a firm that was about to be dissolved, and one of the partners requested him to invoice the goods to the new firm. The creditor invoiced them accordingly, and, on the new firm failing, he attempted to claim on the members of the former copartnery. It was held there that by his conduct he accepted the new firm as his debtor, and had discharged the old firm. That, and *Buchanan's* case, are examples of novation, according to Scotch law; but it cannot be said that they lay down, so clearly as might be desired, the principle of discharge by representation or holding-out, by which the more difficult of cases must, I think, be decided. In England, the law seems to construe more easily a creditor's conduct and dealings as a consent to discharge by novation. See as to the relief of a former banking firm, by the depositors taking new deposit-receipts from the new firm, and otherwise recognising the latter as their only debtors (*Bilborough*, 5 Ch. Div. 255). In the case of *Rolfe* and the *Bank of Australasia*, in 1865 (1 P. C. Appeals, p. 27), a firm had taken into partnership two of their clerks, and the arrangement between the old firm and the new one was that the latter should take over the debts and liabilities of the old firm. The creditors objected to being bound by that, and their opposition involved the consideration of two questions, as one of the judges put them—first, whether the new firm had assumed liability to pay the debts of the old firm; and second, whether the creditors had agreed to accept the insolvent firm as their debtors, and to discharge the old partnership from its liability. That second question shows exactly the nature of novation. If you want to get free from

a creditor by novation, you must show not only that he accepted an obligation from a new debtor, but that in some way he agreed to discharge the old. The English Court held that when a new firm undertakes to discharge the liabilities of the old firm, and announces that to the public, very little is required to ensure an assent to the arrangement by the creditors. They said—"Here the creditors of the old firm, knowing of the change of partnership, and that the new partners had taken over all the assets, and had agreed to be subject to all the liabilities of the former firm, not only continued their dealings with the new firm upon the same footing as with the old, and received payment of that portion of their debt out of the blended assets of the old and new firms, but themselves proved that from the time when they understood that the new partners took over all the assets, and became subject to all the liabilities of the preceding firm, they 'henceforth treated the partners in that firm as their debtors, in respect of the debt owing to them at the time of the creation of that firm, or of so much thereof as for the time being remained due.'" Having done all that, the Court in England held that they had discharged the old firm; that the new firm alone were their sole debtors, and that they could not go back on the partners of the old firm. These are some of the authorities on the matter; and if the circumstances constituting novation seem a little ambiguous to you, you must remember that it is a question of circumstances, and that it is impossible to define all the different kinds of conduct which may warrant a jury or the Court in coming to the conclusion that the original debtor must fairly be considered as having been discharged by the acceptance in his stead of a new obligant. As a practical rule, one might hold that the taking of a bill of the new firm, or other new debtor, after intimation that the new firm had taken over the estate and was to pay the debts of the old one, then waiting the currency of that bill, and allowing the original debtor to enter into or carry out arrangements with the new firm on the faith of the debt having been paid, would probably discharge the old firm as by novation. According to English law and practice, it may be stated more broadly that discharge of the old firm will be inferred from the creditor receiving the bill of the new firm, and acting in any way that shows he accepts them as his debtors, and

discharges the old firm. Certainly, if, for instance, he closes the account of the old firm in his books, and opens a new account in the name of the new firm, I should hold that as quite sufficient, along with notice of the change of firm and acceptance of the new firm's bill, for an implied discharge of the old debtors. You see the general principle of our law is that novation is not to be presumed; and that the old debtor is not discharged by the creditor taking an obligation for the same debt from another person, unless there be circumstances sufficient in reason and justice to bar the creditor from having recourse on the original debtor. In regard to the obligations incurred to its policy-holders by an insurance company, there is a statutory provision which prevents discharge by novation on the transfer of the business and liabilities to another insurance office, unless the abandonment of the original company's obligation and the acceptance of the new company as sole debtor shall be signified expressly in writing, signed by the policy-holder or his agent (35 & 36 Vict. c. 41, sec. 7).

That closes all I have to say on the subject of novation, and the fourth subject which I wish to bring under your notice is that of compensation or set-off. I have already explained to you, that in Scotland a firm has a personal legal existence, distinct from any of its individual partners. The consequence is that the company may have a claim for debt against one of the partners, and one of the partners may have a claim against the company; and there may be compensation between them. In that way it follows, that if the partner be called on to pay his debt to the company, he may set off against it the claim of debt which he has upon the company. Of course, in questions where the interests of third parties as creditors of the company are involved, the plea of compensation against the company will not avail to prevent a partner from having to contribute enough to pay the company debts. He is liable in the full 20s. per £ to third parties who are creditors of the company. It is when the company is solvent, and the rights of third parties are not involved, that as between the company and the individual partners of the company there may be compensation. The more important aspect of compensation is as to its operation between the company and third parties. On that matter

I have prepared four rules or heads, under each of which I mean to make a few explanatory remarks. Before entering on these four heads I remind you of the general conditions applicable to all cases of compensation. Compensation, as you know, operates so that if A is owing a debt to B, and B is owing a debt to A, the one debt should be set against the other, and only the balance, if any, needs to be paid or decerned for. That is compensation; and the general conditions are that both parties must be debtor and creditor in their own right, at the same time, and in the same kinds of debts. A claim of damages, or an open account, cannot be set against a debt rendered liquid and ascertained by bill or bond, nor can a debt in goods be set against a money debt. A liquid debt may be set against an open or illiquid debt, but not conversely. These things being assumed, we are now to speak of the law of compensation in its special application to the partnership relation. The first of the four rules which I wish to state is that the debtor of a company cannot plead compensation on a debt due to him by one of the partners. If a company is suing one of its debtors, that debtor is not allowed to require that a debt owing to him by one of the partners shall be set against or deducted from the company's claim. Because a company is a distinct person from the individual partners, it is not of any avail for a debtor to the company to say he is also a creditor of one of the partners, and will settle his debt to the company by the claim he has against one of the partners. That is the first and general rule; but I am afraid I must put a rider on that rule, by way of an exception in the case of a company being dissolved. Upon the dissolution of a company, the assets are held to be vested in each partner for his own share, so that if a company and its surviving partners sue for a debt due to the company, the company's debtor, who is also creditor of an individual partner, may thereupon plead compensation, not for the whole debt, but to the extent of the share of the partner who is debtor to him. That is laid down in the case of *Mitchell*, 5th February, 1869 (7 Macpherson, p. 480). "It is settled law," says the present Lord President, somewhat broadly, "that so soon as a trading company is dissolved without becoming bankrupt or being insolvent, the assets of the company are no longer company property, and cannot be

uplifted by any of the partners without special authority, but belong to the partners either in equal shares or in such other proportions as may be provided by the contract of copartnery." So that the result is that, after dissolution, if a company's debt is sought from a debtor of the company who is creditor of one of the partners he may plead compensation against the company claim to the extent to which it belongs to his debtor. He may say in effect: "I shall settle my debt to the company to the extent of the share belonging to the partner who is a debtor to me, by setting off his debt against the sum due by me to the company." But you must understand that that is an exception to the first rule, which I have already stated, of no compensation against a claim by a copartnery on the private debt of one of its partners. The second rule which I have noted is this, when a company is debtor to a third party, and is sued by that third party for the company's debt, if one of the partners is a creditor of the claimant, the partner's debt may be set against the third party's claim. That rule seems at first sight contrary to the principle which requires that both parties in a case of compensation shall be debtors and creditors reciprocally. The apparent inconsistency is removed when this rule is treated as really meaning that the company may, as the assignees of their partner, plead compensation on his debt against the company creditor. The partner's consent to his private debt being so used and applied to extinguish an obligation due by the company is necessary; and all that this rule implies is, that the company, on being sued by their creditor, may, with consent of their partner, and truly as his assignees, set his private debt against the claim upon the company. The third rule which I state is this, when a partner is sued for his private debt by a third party, and his creditor happens to be a debtor to a company to which the partner belongs, the partner has no right to set against his private debt the debt due by his creditor to the company. That third rule suffers an exception, in the case of dissolution, on the same principle which was stated in the case of *Mitchell* already mentioned. After dissolution, and when there is no question of solvency, the company estate belongs to each partner in the shares fixed by the contract. In the event of such dissolution, then, if a partner is sued for a private debt by a debtor of his partnership, he can plead against

his creditor compensation for the share of the company's debt belonging to him as a partner of the dissolved firm. This exception has some direct support also from the case of *Heggie*, 26th November, 1858, 21 D. p. 31. The third rule thus is, that in an existing company a partner cannot plead compensation on a company debt owing by his private creditor; but if the company is dissolved, he can plead compensation to the extent of his share of the debt due to the company by his creditor. The fourth rule is this, if a partner sues a creditor of the company for a debt owing to him individually, the creditor of the company is entitled to set against the partner's claim the company's debt. This rule will be more easily followed by a little more detail. A partner of a firm sues a third person who is liable to him individually in a personal and private debt, but that person has a claim against the company of which the individual partner is a member. The debtor in that case can plead compensation against the partner for the company debt. The reason of this rule is obvious. The partner is liable *in solidum* for 20s. per £ of the company's debt, and it in no way affects or lessens his individual liability that the company estate and his copartners are also liable for the same debt jointly and severally with him. When he claims his private debt from a third party, who is a company creditor, the debtor to him is justly entitled to refuse payment, unless upon being paid or receiving credit for the company debt. So that, you see, this fourth rule is quite fair. These, then, are the four rules with regard to compensation as modified by the law of partnership, and with these we may leave this branch of the subject. These rules follow, as you observe, from the doctrines of the distinct *persona* of the company, and the unlimited liability of each partner to the creditors of the firm. The exceptions to the first and third rules are brought into consistency with principle only by holding that dissolution has the effect of vesting the company estate in the partners for their respective shares.

The fifth matter I wish to bring under your notice in our discussion of the law of partnership is the nature of the notices which are required of the dissolution of a firm. These notices are necessary in order to protect retiring partners from a continuance of liability in the event of the business being carried on by any persons to whom it may have been transferred. The notices

that have to be given are these :—Circulars must be sent to all the customers of the firm for their special information, and a notice of the dissolution must be advertised in the *Gazette*, so as to warn the general public. In addition, in practice there is usually notice of the dissolution given in the local newspapers. The meaning of these notices is to prevent retiring partners being subjected in liability for debts to be incurred by their successors in business, on the ground that they have allowed themselves to be held out as still partners, and have so misled people into trusting the new firm on their credit. When, for instance, there is a firm of three partners, and it is arranged that one of them, A, shall retire, while B and C continue to carry on the business; if A does not give notice in the *Gazette* and by circulars to all the customers of the firm, A may incur liability for B and C in the conduct of the business after he has left the firm, because he has not destroyed the repute of his being a partner of the firm. He may continue to be liable for all the debts of the new firm, unless he gives these notices. It is not necessary for a dormant partner, a sleeping partner, who retires, to give notice at all. A latent partner is a person not known to be a partner. There is no repute that he is a partner at all; he is an undisclosed principal; and therefore when he retires he will be free at once by his retiral, even though he has given no notice. This, which is the English rule, seems to follow from established principles in the matter, although the Court of Session lately held a latent partner freed from liability after his retiral without notice, not on the ground that such notice was unnecessary in his case, but because the new firm had advertised its constitution in terms which excluded him (*Mann v. Sinclair*, 20th June, 1879, 6 R. 1078). In the case of death no notice is required from the representatives of the deceased partner. Death is taken to be a public fact, coming to the knowledge of everybody, so that no continuing liability will attach to the representatives.

The sixth matter which I wish to refer to relates to the state of a firm after dissolution. We have partly gone into that in a previous lecture, but we have here to notice that the firm is held to subsist, after the dissolution, for the purpose of winding up. There is, however, a difference which arises in regard to the manner in which a firm can sue or be sued. We saw that

before dissolution, while the firm was going on, the firm could sue or be sued in its company name, without any individual partners being conjoined in the summons. Further, it is necessary that any partnership debt be constituted by decree against the firm before it can be enforced against any of the partners. After the dissolution the power of suing in the company's name alone appears to be gone, and there must be conjoined with the name of the company the names of all the partners, or at least of those who are charged with the winding up. Further, after dissolution of a Scotch company, though the firm's name may still be used as that of the defender, it will be necessary to call all the partners and their representatives who are within the jurisdiction of the Court, in order to establish joint and several liability against them. In regard to an English firm, where there is no separate *persona* of the firm, the partners, or such of them as are found within the jurisdiction, may be sued here individually for partnership debts after as well as before dissolution. See *Muir v. Collett*, 17th June, 1862, 24 Dunlop, p. 1119.

It only further remains to complete this subject of partnership to remind you of some peculiarities in the bankruptcy of a firm or copartnery. A firm, you will remember, may become notour bankrupt by any one of the partners being made bankrupt for a company debt. We had occasion in former lectures to refer to the difference between notour bankruptcy and insolvency, and need not further resume this topic. In ranking upon the estates of the company and of individual partners respectively, there is a difference between the bankruptcy laws of England and Scotland. The joint-estate of the partnership is alone primarily liable for the company debts in England, and it is only if there is a surplus after paying the private creditors that the separate estates of the partners are applied to meet the company debts. It is otherwise in Scotland, where, as we have seen, the company creditor is ranked not only on the company estate but also on the private estate of the partners *pari passu* with their private creditors; and the only limitation of his ranking is that the value of his claim on the company estate must be deducted before he is ranked on the partner's estate.

LECTURE X.

THE COMPANIES ACTS.

THE subject of our lecture on this occasion is the Companies Act of 1862. The main objects of this important statute are twofold—(1.) To fix the conditions under which joint-stock companies may be established with the privilege of limited liability for their members; and (2.) To provide for the registration and regulation of joint-stock companies in general, with or without limited liability. The references to this statute and the amending Acts are as follows:—25 & 26 Vict. c. 89; 30 & 31 Vict. c. 131; 40 & 41 Vict. c. 26; 42 & 43 Vict. c. 76; 43 Vict. c. 19.

We have already seen that at common law every partner in a company incurs unlimited liability for the company's debts. There is no means at common law whereby a man can be a partner in a concern and escape being liable to every penny of his fortune for the debts of the firm; but it occurred to some people that this was a great hindrance to joint-stock proceedings. There was no reason, it was thought, why if any persons chose to establish a company, they should be liable in every penny of their fortunes for that company's debts, provided that they gave proper notice to the public of the new and special terms under which the company was formed. The common law liability was a barrier to enterprise, and it was regarded as a fair thing to allow joint-stock companies to be formed on the footing that the members should incur liability only for a definite and limited stake in the venture. There were great discussions on the policy of such legislation some years ago. Its evil side is seen in the facilities and inducements which it offers for the frauds upon the general public involved in getting up companies whose only real object in existence is to start a speculative and temporary traffic in their shares to the profit

mostly of some astute conspirators. Its good side, in limiting the effects of commercial disaster, was forcibly shown by contrast with the crushing burden of unlimited liability thrown upon the shareholders of the City of Glasgow Bank in 1878 ; in view of which, and of the growing reluctance in men of substance to invest in bank shares with unlimited liability, the Legislature has now, by the Act of 1879, afforded facilities for turning unlimited banks or other joint-stock companies into limited companies. The statutes by which the principle of limited liability is regulated are, in addition to the Companies Act of 1862, the amending Acts of 1867, 1877, 1879, and 1880, all referred to by the statutory title of the Companies Acts, 1862 to 1880.

Limited liability had to be fenced with safeguards to the public. Full notice that the company was a limited liability company, and that creditors could only look for partial liability of the members for the debts of the concern, was evidently necessary ; and we shall see in the sequel that this has been attended to by the Legislature. Under these Companies Acts, any seven persons may constitute themselves into a company with limited liability. More than twenty persons are not allowed to form a company, unless they be registered under this Act. They need not necessarily take the advantage of limited liability, but they must be registered under this Act if more than twenty persons combine to form a joint-stock company. In the case of banking business, more than ten persons are not allowed to constitute a banking company without being registered under these Acts. Companies incorporated under these Acts may or may not be registered with limited liability. Besides the ordinary company limited by shares of specified amount, the leading Act provides for companies limited by guarantee, in which the shareholders undertake that they shall each contribute a definite amount to the assets of the company in the event of its being wound up. This latter form has been chiefly used by associations not seeking any commercial profit, which in this form can acquire the privileges of incorporation under the provisions of section 23 of the Act of 1867. The Companies Acts also provide for the voluntary registration of existing joint-stock companies, with the privilege of incorporation, and now under the Act of 1879 with the power of obtaining limited liability under certain conditions for

the protection of creditors. Our remarks shall be mainly directed to companies taking advantage of the principal Act, and having limited liability. Now, the way in which a company is formed under the statute is by any seven or more people signing a memorandum of association. That memorandum specifies generally the purposes of the company, the place of its registered office, the amount of its capital, and into how many shares the capital is to be divided. Thus, the nominal capital may be stated as amounting to £500,000 divided into so many shares of £10 each. The provisions of the memorandum of association, and especially those relating to capital, are fundamental. The capital can neither be increased nor diminished unless express and clear powers are taken so to do, in the articles of association; and the provisions of the Act of 1867 as to reduction of capital must be followed. Seven people may sign the memorandum, and each take no more than one share; so that you may have a company started, with a nominal capital of half-a-million, and yet have only seven people signing as constituent shareholders for not more than seven shares of £10 each or £70. That is a peculiar and somewhat ludicrous state of things, but it frequently happens. The memorandum of association is signed by these persons, and it must then be registered by one of the registrars of joint-stock companies, who is appointed by the Companies Act for each of the three kingdoms respectively. Along with this memorandum are usually registered the articles of association which regulate the manner in which the business of the company is to be carried on, fix the power of the directors, when the meetings are to be held, in what manner and under what circumstances dividends are to be declared, and how the shares are to be allotted and transferred, forfeited or cancelled. Care is to be taken in the formation of a company to have all powers convenient and necessary for its special business set forth in the articles. No company, for instance, can in any circumstances buy its own shares, unless the power to do so is expressly conferred by the articles (*Cree*, 20th June, 1879, 6 R., H. of L. 90). The form of these articles of association is provided by the statute; and if the company does not provide articles in different terms, the form appended to the statute will be held to be the articles adopted by the company. Most companies make modifications on the statutory

form, and frame articles of association for themselves. The memorandum of association, and the articles of association, if any, are registered in the Register of Joint-Stock Companies, and the company then becomes an incorporated company, with all the privileges of an incorporation, such as perpetual succession, right to use a common seal, to hold and sell land, and to sue and be sued in its company name. For the protection of the public, however, it is anxiously provided by the statute that all limited liability companies shall have "limited" affixed to their names as part of their designations. The title of the company must be such, for instance, as "The Lonsdale Mining Company (Limited)." The intention of the statute is that, by the use of that word, the public shall have notice they are dealing with a company the shareholders of which are only liable for the amount of their shares and no further. Besides these provisions, it is also enacted that there must be a register of the members kept in the registered office of the company, which is open to any one who chooses to see who are the members; and every year the company is bound to send a list of its members to the Registrar of Joint-Stock Companies; so that either in the office of the company or in the hands of the Registrar of Joint-Stock Companies access can be got to know who are the shareholders. If any officer does not use the word "limited" in any contract, the officer of the company so failing in this duty is to be held personally liable. Thus, for instance, if the directors or manager order goods or enter into contracts on behalf of the company, and do not use the word "limited" in the contract to indicate that the company is a limited liability company, they will be personally liable on the contract, without regard to whether they are shareholders of the limited liability company or not. Notice to the public of the limited liability is fully provided for, but the further result of these statutory enactments is that creditors have no direct action against individual shareholders of the company. In a private partnership, a creditor may sue the company and the individual partners, and recover from the company or the partners directly, without being in any way restricted to the company assets. In the case of a limited company a creditor cannot do that; the only means whereby he can reach the shareholders of the company is by insisting on

winding up the company in the manner to be afterwards noticed, by which he can get an official liquidator appointed, who will recover from the shareholders the amount of unpaid calls on their shares. That is the only course open against the shareholders; the creditor cannot sue them directly. With that exception, the liability of partners is the same as in a common-law company; they are liable to creditors, but they can only be reached by winding up, and only to the extent of the unpaid calls on their shares. It is the same, indeed, with regard to all companies registered under this Act, whether unlimited or limited. They acquire, so far at least, the peculiar privileges of incorporation, that the relation of debtor and creditor which is established under this Act is established only with regard to the common fund or capital of the company. "A capital is created, sometimes limited, sometimes without a limit; but that capital is to be made good in the shape of a common fund, and that common fund it is which is to be the source of the payment of every creditor of the company. And although it is quite true that members and ex-members of the company are placed by the Act under liability, that liability is a liability not to make payments to creditors, but it is a liability to contribute and make good what should be the proper amount of the common fund. Then, having got into the common fund every sum which ought to be contributed to it by every person whatever, the Legislature takes possession of that common fund and proceeds to distribute it amongst the creditors of the company."—*Per Lord Cairns, Webb v. Whiffin*, 5 H. of L., E. & I., App. 711.

These are the general rules that we have to notice with regard to limited companies under these Acts; but, as you are aware, these companies are often started or floated by enterprising individuals who are known as promoters. The promoter is a gentleman who sometimes makes it his business to start companies; but whether he makes it his business or not, he is the person engaged in getting up a particular company. The general course is that such a man hears of a wonderful mine in Colorado or Eldorado; or of a property which might be bought to great advantage and would yield fabulous returns; or, again, he has news of a business of some repute from which the partners wish to retire for sufficient reasons, by transferring it for good considera-

tion to a public company. He goes to the existing owners, in any of such cases, and makes a provisional contract for the sale of the property, business, or mine, in order that he may get up a company to work it. His services are often useful, and in general he is fully aware of their value. There is a strong temptation to a person in his position to take something secretly, to his own advantage. He, perhaps, provisionally agrees to acquire the property, whatever it may be, for £50,000, intending himself to sell it over to the company for £100,000—a not uncommon proportional advance. He, perhaps, gets the seller to have the sum of £100,000 put into the formal contract as between the seller and the intending company, and his provisional arrangement that the seller will take from him a much smaller sum, is kept secret between him and the seller. Well, the law—both the common law and the statute—is most firm and distinct, that a promoter occupies, in regard to the company, a fiduciary relation; and he is not allowed to make any profit whatsoever out of the bargain which he proposes to the company, unless in so far as he has declared what profits he intends to take, and has laid the matter before the company fully and freely. The company is not yet registered; the memorandum of association has not yet been registered, but, nevertheless, the promoter gets the bargain, and proposes it for the acceptance of the company, and he is held to stand in the position of agent or trustee of the company. If he could himself pay the amount stipulated in his provisional contract with the seller, nobody can prevent him doing so, and taking the transfer to himself. But when he is unable himself to pay, and confines himself to inducing third parties, as shareholders in a company, to adopt his provisional contract, he is really their agent in the transaction, and must not deceive them into paying a price, part of which is to go as a secret bonus into his own pocket. It is perfectly lawful for him to announce, when he proposes the bargain to the intending company, that he has arranged to get a certain bonus on the transfer; and if his constituents, with full knowledge, consent to his getting this profit, there is nothing more to be said. But if he does not announce the precise bonus and extent of his own interest in the purchase, and directly or indirectly secures a profit of which he has not told the company, the

company, on being incorporated and discovering the matter, can compel him to pay back to them the profit which he has secretly made on the sale; or the company may, in its option, set aside the bargain altogether. That doctrine, of course, is a very repulsive one to gentlemen whose business it used to be to establish these companies; but by a series of late cases the doctrine has been most firmly established. Thus, in the case of *New Sombrero Phosphate Co. v. Baron Erlanger* (V. Chan. Div. 73), this baron, who was one of the promoters, bought a Peruvian guano island for some £55,000, and put it in the name of a mere nominee of his own, as nominal intermediate contracting party, for the sale of the property to a company which was got up for the purchase by the baron and his friends. His nominee was to sell to the company for £110,000—a profit to the enormous amount of some £50,000. Upon the face of the matter, the company was to pay this £110,000, and there was no information whatever given to intending shareholders that the difference between this sum and the price given to the real seller was to go into the pockets of the promoters of the company. The transaction was thus most artfully managed. The syndicate of promoters first got the purchase in name of their nominee, and then got up a company to purchase ostensibly from this nominee; and it was carefully concealed that the sum to be paid included a very large profit on the original price to the very persons who had got up the company. The company, however, discovered that in reality the difference of £55,000 went into the pockets of the baron and the other promoters; and the Court of Appeal in England, on the matter coming before them, ruled that the purchase must be set aside, and that the price paid by the company must be returned. The baron and the other promoters had professed to be buying on behalf of the company, while in reality he and they were selling on their own behalf, without disclosing their interest; and the transaction, as being induced by fraudulent concealment and misrepresentation had to be set aside, and the money returned. You see that is the same doctrine which we previously examined in regard to principal and agent. A man who holds himself out as my agent to purchase is not allowed to make a profit on the sale without telling me, and getting my consent. If he tell me of

the profit he is making at my expense, it is quite fair; but if he does not tell me, then if he makes a profit, he must give me that, or I may set aside the purchase, at least when the real seller has been privy to the fraud of the agent. The promoter is in the same position. He holds himself out as a man who is introducing an intending company to a good bargain; and if he makes a profit secretly the company can insist on his handing that over. And in the same way there was a decision the other day—for the doctrine has not yet got into the heads of promoters—in the case of *Bagnall*, 6 Chancery Division, 371. In that case, the owners of certain colliery and ironworks agreed to sell them for £300,000 to a company to be formed by two or three promoters, who were to receive out of the price £85,000 for their risk and trouble from the sellers. The promoters got up the company, which adopted the purchase, and paid the £300,000 without any notice that their agents or promoters were to receive out of this price the large bonus promised them secretly by the sellers. The Court, again, in that case, had no hesitation in deciding that the promoters must hand over this secret profit to the company, which had been got up and induced to purchase by their agency. This is only another illustration of the principle that a man who holds himself out as a promoter cannot make profit out of the company beyond what he has fully and fairly disclosed to the intending shareholders. It is with a view to enforcing without superseding this doctrine of equity jurisprudence that section 38 of the Act of 1867 provides—"Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or by the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract." It is curious to see how promoters try to get out of the responsibility imposed by this provision. In the case of *Twycross v. Grant* (2 C. P.

Div. 469), Mr. Grant, as promoter, had got up a large company. He got a concession from the Portuguese Government to make a tramway line about Lisbon, and the company was to make and work this line. That was duly advertised in the prospectus, but Mr. Grant did not think it necessary to state that he had two other contracts; one in particular with a contractor, which was that, in consideration of his getting the contract for the making of the line, the contractor would allow Mr. Grant a large sum, something like £20,000 or £30,000, out of the price to be paid by the company. After the company was established a shareholder, named Twycross, brought an action against Mr. Grant, challenging the prospectus as fraudulent under the statute, inasmuch as it gave no notice of a contract whereby the promoter was to get an advantage from the contractor with the company for the line. The jury returned a verdict in favour of Twycross for the amount which he had paid for his shares. The company came to nothing, and its shares were not worth anything like their original price. Mr. Grant in that case appeared in person, and contended very strongly that this was not a contract which he was obliged to give notice of at all; but the Court were against him. There was a considerable division of opinion, no doubt, but they held that this fell within the description of a bargain or contract whereby he was to get advantage, directly or indirectly, out of the company, and which must be advertised in the prospectus, otherwise it was fraudulent. Lord Chief-Justice Cockburn remarked what I think is very sound sense—"I cannot allow myself to be led into splitting hairs, or to entering into minute verbal criticism on what I believe to be beneficial legislation. When, therefore, I find the case indisputably within the terms of the Act, when taken in their ordinary sense, why am I to give a different and narrower meaning to those terms in order to exclude it? It is admitted that a contract which imposed a burden on the company would come within the section. But, in the name of common sense, what difference is there in principle between a contract which takes money from a company's funds by an obligation directly binding the company, and one which saps these funds through a clandestine contract with a contractor? The one form of proceeding is no doubt more subtle and invidious than the

other, but it is not the less prejudicial to the interest of the company, or less essential to be made known to those who are invited to join it." Accordingly in that case Mr. Grant was decerned to pay damages to the shareholder to the amount of the original price of the shares in respect that he had been induced to join the company by a prospectus that did not reveal the whole contracts. So that we may hold it as pretty well settled in law now, that a promoter, who wishes to take profit, directly or indirectly, out of any contract which he induces the company to enter into, can only do so on condition of making in the prospectus a full and fair disclosure of what he is going to obtain; and that if he does not do that, and obtains a profit secretly, he will be forced to give up that profit to the company, or to answer in damages for the fraud to any shareholder who has been induced, to his loss, to purchase shares on the faith of the prospectus.

Now one of the first things the promoters do is to issue the prospectus of the intended company—that is the advertisement depicting, generally in rose-coloured terms, the general importance and advantages of the undertaking, and the large profits that are sure to be derived from it. That prospectus, with which we are all familiar, is the basis upon which the public are expected to make their applications for shares, and to receive their allotments of shares; and accordingly the Court often have had to proceed pretty strictly in restraining any attempt at misrepresentation, or deceiving the public into joining worthless adventures. The principles laid down in these matters are quite distinct, and it is well for business men to know about them. The Court laid these down most clearly in the case of the *Venezuelan Railway Company* (2 E. & I. Appeals 99):—"Although, in its introduction to the public, some high colouring, and even exaggeration, in the description of the advantages which are likely to be enjoyed by the subscribers to an undertaking may be expected, yet no misstatement or concealment of any material facts or circumstances ought to be permitted. In my opinion (says the Lord Chancellor), the public, who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character as the promoters themselves possess. It cannot be too frequently

or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterise their published statements. As was said by Vice-Chancellor Kindersley, in the case of the *New Brunswick and Canada Railway Company v. Muggeridge* (1 Dr. & Sm., 381), 'those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.' " I think it is very likely that, if these rules of the judges were always strictly observed in practice, there would be fewer complaints of people being induced to embark in hazardous or hopeless speculations. Still, that is the standard of rectitude by which the Court try any prospectus. The promoters have to give to the public substantially the same materials for judgment which they possess themselves. They must make no incorrect statement on any material matter of fact, and must not omit anything which is of importance to be known in order to form a fair estimate of the venture proposed. Upon this prospectus the public are invited to give in their letters of application for shares; and it follows, from the prospectus being the basis on which the public are invited to join in the company, that if it can be shown to be fraudulent, whether by misrepresentation or concealment, it will be in the power of the applicant for shares to repudiate the transaction. He is entitled to plead that he has been misled by a fraudulent prospectus, and to decline to take the shares. If he has had them allotted to him, he may throw them up, and demand back his money; or, if he is too late for that, he may have a claim for damages against the persons who have fraudulently issued the prospectus. The first thing that an applicant has to look to is whether there is any variation between the prospectus and the

memorandum of association. If the prospectus advertises one concern, and the memorandum of association contains provisions for carrying on an entirely different business, the applicant for shares, on discovering the material difference between the constitution of the company as advertised and as registered, is entitled to say that this is not the company advertised in the prospectus, and which he was invited to join; and thereupon he may throw up his shares, and have his money back. But the condition of this relief is, that he must lose no time. He must examine the memorandum of association and the articles of association as soon as he can. He ought, if they are registered, at all events to examine them on the allotment of his shares; because if he delays doing so for an undue period he will be excluded from the remedy of restitution, which he would otherwise have had. With regard to fraud in the prospectus greater indulgence is given for complaint. If a shareholder can show that the prospectus has misrepresented the affair materially, that it has led him into an undertaking which, if he had known the truth regarding it, he never would have joined, he will be allowed to bring his challenge after allotment and even after holding the shares for some time. The only limitations to the defrauded shareholder's remedy are—(1.) that he must not be chargeable with unreasonable delay or with acquiescence after he has acquired a knowledge of the facts; (2.) and that he can in no case be relieved of his shares and of his liability as a contributory after the winding up of the company has once commenced. By recent decisions in two City Bank cases this latter limitation has been extended to exclude a shareholder from setting aside his membership, as having been induced by fraud, any time after the company has stopped payment and ceased to be a going concern (*Tennent*, 6 R. 555, H. of L. 69; *Houldsworth*, 6 R. 1164, H. of L., 7 R. 54). The interests of innocent creditors come in at the stoppage, and they are entitled to reach everybody or anybody on the register or who has had shares allotted to him, in order to recover debts due to them by the company. But before the stoppage or winding up of the company any shareholder who comes without undue or unreasonable delay will be entitled to be relieved if there has been fraud or misrepresentation in the prospectus which induced him to join the

company. In the *Venezuelan Railway* case above mentioned there were held to be misrepresentations in the prospectus, and the shareholders got the benefit of relief before the winding up. But, besides that, even after the winding up, if it is no longer competent to rescind the allotment, the shareholder can always have an action of damages against the individuals who issued the prospectus. That last consideration is a warning to promoters as to what they put into their prospectus; for if it is not so drawn as to carry out the rules given as above by the Lord Chancellor they will be liable to an action of damages as for deceit; and the shareholders will recover the amount of money put into the company by them, and which has been lost.

Suppose, then, we have got the prospectus issued, the next question which we ask ourselves is as to who are the shareholders, and how do they become such? Well, the Act provides that everybody is a shareholder who has agreed to become a member of the company and whose name is entered in the register of members. By the construction of the Courts, however, the provision has practically come to be this, that everybody on the register is *prima facie* a member, but that everybody also who has simply agreed to become a member of the company will be liable as a shareholder, even though he may not be on the register. The result is, that if, on examination of the register of a company, you find certain names, then you may assume with great probability that all the people whose names are entered there are shareholders; but that there may be other people, whose names have been improperly omitted, who are liable simply because they have agreed to take shares. Power is given to the Court to rectify the register by removing or inserting names improperly registered or omitted, as the case may be. This power of rectification may be exercised either before (sec. 35) or after (sec. 98) a winding up, and on the motion either of the company or of the person interested to have the register rectified. Such rectification may proceed on evidence of an agreement to become a member as by purchasing shares. The Court have in four City Bank cases distinguished between an agreement to become a member onerously undertaken, as by a purchaser, and a like agreement voluntarily made with the company, as by executors of a deceased shareholder, holding the former alone enforceable to the

effect of registering the purchaser's name instead of that of the seller (*Macdonald*, 6 R. 621; *Myles*, 6 R. 718; *Howe*, 6 R. 1195; *Stenhouse*, 7 R. 102).

An agreement to become a member of a company is usually in writing, and at the beginning of the company it is generally made by letters of application and allotment. A letter of application for shares is often accompanied by a deposit, with the bankers of the intended company, of part of the price of the shares required by the prospectus to be tendered in advance. This letter of application is sent to the directors; and, if they allot shares, they complete the contract with the applicant by sending a letter of allotment. These documents—the letter of application and the letter of allotment—complete the contract; they are the shareholder's contract, by which he has agreed to take shares, and by which he gives authority for the registration of his name as a member of the company, according to the memorandum of association and the articles of association. The prospectus is the inducing cause for the application; but if there be no material variation between the prospectus and the memorandum or articles, and no fraud, the shareholder, on allotment, becomes bound by the memorandum and articles in all their terms and conditions, as the official documents constituting the company. It may, however, happen that the agreement to become a member of the company set forth in the letters of application and allotment is expressed conditionally on the occurrence of some event. In the case of the *Consolidated Copper Company of Canada* (22nd December, 1877, 5 R. 393), the letter of allotment by the directors contained this provision, that in the event of the mines not being purchased, the shareholder's money would be returned without deduction. The mines were not purchased, and the money was returned to all or almost all the applicants for and allottees of shares. That occurred in 1872; and thereafter some creditors put the company into liquidation, and attempted through the official liquidator to make all these allottees liable as contributories. It was contended that having sent in letters of application and got allotments, they were shareholders to all intents and purposes, and could not be relieved from liability as such by the conditional promise to return their money

contained in the letters of allotment. The Court, however, held that the true meaning of the agreement was that there was to be no membership unless the mines were purchased and the company proceeded to business, and the allottees all escaped liability as being only conditionally shareholders. The terms of these letters of application and allotment are thus most important for the commencement of the shareholder's liability. If the applicant is registered contrary to his agreement, and equally if he is not registered in terms of his agreement, redress can be obtained under the power of the Court to rectify the register. With regard, further, to these letters of allotment and to the agreement to become members of a company, it is to be noticed that every person is by the Act of 1867, held to be liable for payment of the full nominal amount of his shares in the absence of a registered contract to the contrary. This important provision is contained in sec. 25 of 30 & 31 Vict. c. 131—"Every share in any company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares." That is a thing to be kept in view; because many people imagine that if a company simply issues shares which it calls paid-up shares, they do not incur liability by holding these. A curious case occurred in showing the effect of this statute, *Pagin*, 6 Chan. 681. The proprietor of a newspaper agreed to advertise for the company, and was in payment to receive paid-up shares in the company, but the contract was not registered. The advertising was done, the promised paid-up shares were issued, but on the company being wound up, the unfortunate newspaper proprietor was held liable for the full nominal amount of the shares. The ground was that no person can be the holder of paid-up shares and escape liability for calls, unless there is a formal contract with the company for paid-up shares, registered in terms of the section above mentioned. Two observations, however, must be made on the effect of this clause. In the first place, it in no way prevents a shareholder, under the seventh of the statutory articles of association, or under any

similar article, from paying up the full nominal amount of his shares to the company. When he has done that, even without any call having been made on the shareholders generally, he has discharged his full liability, and he validly holds his shares as fully paid up. Secondly, If the company has, contrary to the Act, issued shares as being fully paid up, a *bond fide* purchaser and transferee without notice from the original allottee, is safe from being compelled even in a winding up to pay calls on his shares, *Waterhouse* (1870), 8 M., H. of L. 88.

The management of the company while it is carrying on business is in general left to the directors, and their authority is defined by the articles of association. These directors are merely agents of the company for its management, and trustees or factors for the company to look after its property. This their legal position leads to the same equitable results which we have seen in the case of agents generally—that is to say, as agents they can make no profit out of their position, beyond any allowance which may or may not be provided for them by the articles. If they make profit in managing the affairs of the company, they must hand that over to the company; and they must not put themselves in such a position that their personal interest will conflict with their duty to the company. It is with regard to the powers and position of these directors as to strangers that we are mainly interested in the first place. There is a curious case which occurred in Ireland not long ago, where a company called the East Holyford Mining Company was established (7 E. & I. App. 869). The memorandum of association was registered, but the statutory meetings were never called: no directors were properly appointed, and no secretary. Nevertheless, by means of a glowing prospectus and advertisements, the company attracted a good deal of money for shares, especially from England; and thereupon one of the promoters appointed himself to be secretary, and three or four friends to be directors. They never called meetings of the shareholders, but styled themselves secretary and directors, and had an office, and pretended to carry on the business of the company in due form. The main business, however, consisted of drawing cheques on the National Bank, Dublin, with which bank the £4000 or so derived from the too trustful shareholders was deposited.

By these means they drew out the whole £4000; and on the inevitable winding up, the liquidator sued the bank to account for and pay over to him the whole £4000, on the ground that the bank had paid away the money to persons who had never been appointed by the shareholders to the offices which they professed to hold and exercise. It is of importance to business men having dealings with limited companies to see how the bank escaped. The Irish Court held the bank liable to repay the money; but this decision was reversed by the House of Lords. The articles of association provided that the directors might draw cheques, which the persons calling themselves directors had duly done. The House of Lords laid down that bankers or others dealing with limited liability companies are not bound to find out whether in reality the articles of association have been carried out in the appointment of officers. If a bank, or other person dealing with a limited liability company, finds people acting ostensibly as officers, sitting in the office of the company, and holding themselves out as officers, and doing no more than they would have been entitled to do if they had been properly appointed, the bank, or other third parties acting in *bond fide*, are not bound to inquire into the reality of the appointment. The doctrine laid down is—“A banker dealing with a company must be taken to be acquainted with the manner in which, under the articles of association, the moneys of the company may be drawn out of his bank for the purposes of the company. My noble and learned friend on the woolsack has read those articles by which, in this case, the bankers were informed that cheques might be drawn upon the bank by three directors of the company. And the bankers must also be taken to have had knowledge, from the articles, of the duties of the directors, and the mode in which the directors were to be appointed. But, after that, when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge—namely, the external acts—are rightly done, when those external acts purport to be performed in the mode in

which they ought to be performed. For instance, when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function, and have properly performed the function for which they have been appointed. Of course, the case is open to any observation arising from gross negligence or fraud." That is the general doctrine, and it is one important safeguard to third parties dealing with companies. But it must be observed that everybody, in dealing with a limited liability company, is bound to take notice of the memorandum and articles of association, and to see what can be done by the directors, and what are the proper limits of their powers. It is only with regard to irregularities in the internal management of the company, of which third parties cannot easily have notice, that third parties are protected. As to the manner in which companies may enter into contracts, the provision is that limited liability companies can enter into contracts in the same manner as any other persons in law. When the contract can be made by word of mouth, it may be so done by an officer or agent for the company. When it requires writing, it may be signed and sealed by an agent or officer, in virtue of the powers belonging to his office by the terms of the articles. Bills may be signed on behalf and on account of the company; and in connection with that matter we have already seen, in treating of the law of principal and agent, that directors of a company who do not take care to sign a bill expressly as on behalf and account of the company will be personally liable. But if they take proper care to express their purely representative character they bind the company only by a contract or bill within their express or implied powers. Now that is the position of directors with regard to strangers. With regard to the shareholders of the company, we have already seen that they stand in the position of agents or trustees owing a duty to their constituents. By reason of that position the rule of common law is absolute, that they cannot enter into contracts with the directors for the company in their personal capacity and take profit thereby. If they, while agents for the company, make profit as individuals by such contracts, they must give it up to the company. This rule is frequently modified by a provision in the articles that any director

entering by himself or his private firm into a contract with the company in the line of its business, shall declare his interest in the contract, and shall not vote with his fellow directors in the acceptance or rejection of his or his firm's offer, or in regard to the execution of the contract. If there is a provision of that kind it will be necessary for the director to explain precisely to the board the nature of his interest. Thus, for instance, there was a financial company got up called the Imperial Mercantile Credit Association, for the purpose of effecting loans and other financial operations. A stock-broker, who was one of the directors, got an order to himself individually to place certain debentures for 5 per cent. commission. He went to the other directors and offered them the bargain, declaring in terms of the articles that he had an interest, but he did not tell them he was to get 5 per cent., and he got them to agree to place the debentures for $1\frac{1}{2}$ per cent. Afterwards, on the suit of the company, the Court declared that he must hand over the profit he had made and had not declared—that of $3\frac{1}{2}$ per cent. (*Coleman*, 6 E. & I. Appeals, p. 189). The ground of judgment was that no director is to make profit out of his position, and that even when the articles of association permit him to make a contract with the company, he can only do it and retain the profit when he declares not only that he has an interest, but what that interest is. Directors are liable, of course, to their constituents in the same way as other agents are for gross negligence. If they do not look after the affairs of the company, and the shareholders suffer in consequence, they will have to pay for the consequences. You know that was the decision in various actions arising out of the Western Bank affairs, and also out of the City of Glasgow Bank liquidation. The directors were sued for gross negligence, and in the latest case (11 M. p. 96), the Court sustained the summons to a large extent against W. Baird for gross negligence. As an illustration of the way in which they may be liable to the company for negligence; they have the power to declare dividends, and if they, for instance, declare dividends out of capital, and not out of profits, they will be held liable, and be forced to repay the dividends they have themselves drawn. That is not to say that the Court is to examine minutely whether the estimate of profit and loss has been well founded or not, but the doctrine

is that, when you find a company which certainly has nothing but capital to pay from, and when you find a dividend declared really out of capital, in that case the Court will interfere and compel the directors to repay the dividends they have taken, without prejudice to any further civil or even criminal liability which may, and in the case of the City Bank directors did, arise from the publication of false balance-sheets. And, generally, wherever it is found that directors have been guilty of misfeasance or breach of trust in relation to the company, they will be forced, under section 165 of the Companies Act, as well as at common law, to make good the consequences to the company. In one case (10 L. R. Eq. 298, *Imperial Land Co. of Marseilles*), a London bank, called the National Bank, stipulated for and obtained from the too friendly directors of a company a bonus of £5000 as a condition of opening the company's account with this bank. A large amount, varying from £30,000 to £70,000 of the company's funds was from time to time placed in this bank, and the bonus given to the bankers was quite out of the question as a necessary or proper business arrangement. Though the immediate application to the Court failed, the opinion was clearly indicated that this misapplication of the funds in paying this preposterous bonus was an act for which the directors were liable to the company, and the bank also was shown to be liable as having taken the bonus from the directors when evidently acting beyond their powers. Directors are always required to have the share qualifications specified as necessary in the articles for the office of director. If the articles of association provide that each director must hold so many shares, then if, on a winding up, a director have not so many standing in his name, he is liable to be entered as a contributory to the extent he ought to have had. There have been many decisions on this subject, and in one late case it was held, on somewhat narrow grounds, that the share qualification was prescribed in the articles not for the original directors, but only for those who might be afterwards elected by the company (*Peddie*, 5 R. 407). The safe practical rule is to understand that directors in general will be held liable as contributories for whatever amount of shares they, by the articles of association, or by any representation to the shareholders, undertake to take (*Whitson*, 7 R. 479).

According to the Act of 1867, section 39, there must be a meeting of shareholders within four months of the registration of the company, and other meetings must follow at frequent intervals, as provided by the articles of association. Provisions are usually made as to the number of votes which each shareholder may have, corresponding generally to the number of his shares. Sometimes, under such regulations, a shareholder with a large holding may find it possible to increase his voting power by dividing his shares among nominees of his own; but this, though technically permissible, is a practice not to be commended; and when it is used as a means of covering or aiding a scheme in defraud and injury of the other shareholders, the vote of the technical majority will be disregarded by the Court (*Atwood v. Merryweather*, L. R. 5 Eq. 464). Some things at meetings of the company can only be done by special resolution, and that, under the Companies Act, means a resolution, carried by three-fourths of a general meeting, and confirmed by a majority of another meeting, and then registered with the Registrar of Joint-Stock Companies. That special resolution is required for any alteration of the company's articles, for such a step as applying for a reduction of capital, or other important changes on the company's affairs. It is probable that the fundamental character of the company, as settled by the memorandum of association, cannot be altered by any special resolution, to the effect of changing entirely the nature of its business, or of amalgamating with another company, unless express power to make such changes are taken in the original constitution of the company. One main object of the special resolution is to form a foundation for winding up; and that is a matter to which we have, in conclusion, to direct your attention in regard to these companies.

The winding up of a company may be in one of three forms; it may be wound up by order of the Court, or there may be a voluntary winding up, or a winding up under the supervision of the Court. These proceedings take the place both of sequestration in bankruptcy and of the ordinary proceedings for the dissolution and winding up of common law partnerships. The official winding up, by order of the Court, is the statutory form whereby the creditor gets access against the

shareholders, and obliges them to pay into the hands of a liquidator the amount they have agreed to contribute on their shares. If the company has passed a special resolution requiring the company to be wound up by the Court, that will found an application by the company to be wound up. In the same way, if the company is unable to pay its debts, it may be wound up by the Court; or if the members be reduced below seven in number, it may be wound up compulsorily by the Court. The application for this official liquidation may be made by the company, or by a contributory, or a creditor. The manner in which a creditor proceeds and enforces a winding up is that he may lodge a written demand with the company for payment of his debt. If that is not implemented within three weeks, he may apply to the Court, founding on his demand, and that the company are unable to meet it, and insist on having the company wound up. The like application may also proceed upon his giving a charge of payment against a company on a decree, and generally on the Court being satisfied in any way that the company is unable to pay its debts (*Martin*, 7 R. 352). The consequence of that application is that an officer is appointed by the Court, called an official liquidator, who enters at once into possession of the company's estate, and takes it all into his hand. He then applies to the Court, to settle the list of contributories, gets that list settled, and obtains a warrant to compel them to pay him the amount due on their shares, or so much as may be necessary to meet the liabilities of the company. That is all done in a summary manner, with the view of enabling the creditors to get speedy payment. As soon as this official liquidation is started, no action or diligence can be used against the company; creditors can only claim from the official liquidator, as in the case of claims under a sequestration. This is the way appointed by statute in which the company's assets can be collected and realised for behoof of their creditors. That is the official winding up. But it may also happen that a company is not insolvent, but the period of duration fixed by its articles has expired, or for some other reason it may wish to wind up. It can initiate a voluntary liquidation by special resolution of the company, which thereupon appoints a liquidator of its own. Any such voluntary winding up, equally with a winding up by order of the

Court, stops the company's business, closes the register, and prevents any alteration in the status of its members, except under the powers of rectification given to the Court (sec. 131 of the Act of 1862). A voluntary liquidation has not, however, in Scotland any effect in stopping actions or diligence by creditors against the company or its assets (*Sdeuward*, 3 R. 577). This effect in staying proceedings by creditors can only be obtained in Scotland by an official winding up, or by putting the voluntary liquidation under the supervision of the Court. It is open to the creditors or shareholders, after a voluntary liquidation has been established, to apply to the Court to have the winding up carried out under the supervision of the Court; and then the creditors will have their recourse solely against the liquidator, as in the case of an official winding up. This was the course followed in the voluntary liquidation of the City of Glasgow Bank, which was, on the petition of creditors and contributories, directed to proceed under the supervision of the Court (*Brightwen & Co.*, 6 R. 244).

With regard to the persons who have to pay calls in the winding up, these are technically the contributories. Everybody whose name is on the register of the company, and every one who has agreed to be a member of the company, and who may be accordingly placed on the register by the Court, are the contributories in a winding up. There is one important thing to be borne in mind in regard to these limited liability companies, and it is this: While the existing members of the company at the date of the winding up are liable in the first place to the full amount unpaid upon their shares, the past members of every limited liability company who have not ceased to be members for more than a year, are also liable. The existing members are liable primarily, but failing them, if their calls are not sufficient, recourse can be had against members who have not ceased for more than a year to be shareholders. The conditions of this liability of all who have been members within a year before the winding up are, that the contributions of existing members are insufficient to meet the liabilities of the company, and that the past members are not liable to contribute beyond the extent of the debts contracted before they ceased to be members. The contributions of past and present members alike, and without distinction, when

received by the liquidator, form part of the assets of the company for distribution among its creditors as at the date of winding up. The manner in which the liability is enforced is by calls upon the settled list of contributories, as we have seen in the case of a winding up by the Court. As a general rule no set-off is allowed to the contributories in a limited liability company against their calls until all creditors of the company are paid (sec. 101 of the Act of 1862).

The liquidator is bound, when he recovers the assets, to pay the creditors; and that is done in much the same way as in a sequestration. If there is enough to pay 20s. per £, every creditor gets 20s. per £, and if not, then everybody gets only a dividend. After the creditors have been paid, it is the liquidator's business to adjust the rights of the shareholders among themselves. Thus, if some have held paid-up shares, duly issued as such by contract with the company, and others have held shares on which nothing has been paid up, at the end of the winding up, after the creditors have been paid, shareholders who held paid-up shares will be entitled to have relief by a call from those who had not fully paid-up shares, in order that the loss of capital to each and all upon their respective shares may be the same. That was illustrated in the case of *Paterson*, 2nd March, 1875, 2 Rettie, 490.

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APPENDIX.

APPENDIX.

A Ratification of the Act of the Lords of Council and Session, made in Julie 1620. against unlawful Dispositions and Alienations, made by Dyvours and Banck-rupts.

[1621, c. 18.]

OUR SOVERAIGNE LORD, with advice and consent of the Estates, convened in this present Parliament, ratifies, approves, and for his Highnesse, and his successours, perpetually confirms the Act of the Lords of Council and Session, made against dyvours and banck-rupts, at Edinburgh, the 12. days of Julie, 1620. and ordaines the same to have, and take full effect, and execution, as a necessarie and profitable law, for the weale of all his Highnesse subjectes: Of the which Act the tenor followeth.

The Lords of Council and Session understanding, by the grievous and just complaints of many of His Majesties good subjects, that the fraude, malice, and falshood of a number of dyvours and bankrupts, is become so frequent, and avowed, and hath already taken such progresse, to the overthrow of many honest mens fortunes, and estates; that it is likely to dissolve trust, commerce, and faithful dealing amongst subjects: Whereupon must ensue the ruine of the whole estate, if the godlesse deceites of those be not prevented, and remedied; who by their apparent wealth in lands and goods and by their showe of conscience, credite, and honestie; drawing into their hands upon trust the money, merchandize, and goods, of well-meaning and credulous persons, doe no wayes intend to repay the same: but either to live ryetously by wasting other mens substance: or to enrich themselves, by that subtil stealth of true mens goods, and to withdraw themselves, and their goods foorth of this realme, to elude all execution of justice: And to that effect, and in manifest defraud of their creditours, do make simulate and fraudulent alienations, dispositions, and other securities, of their lands, reversions, teyndes, goods, actions, debtes, and others belonging unto them, to their wives, children, kins-men, alleyes, and other confident and interposed persons; without any true, lawful, or necessarie cause: and without any just or true price interveening in their saids bargaines: Whereby their just creditours, and cautioners, are falsly and godlesly defrauded of all payment of their just debts; and many honest families likely to come to utter ruine.

For remeed whereof, the said Lordes, according to the power given unto them by His Majestie and his most noble progenitors, to set

downe orders for administration of justice : meaning to follow and practise the good and commendable lawes, civil and canon, made against fraudulent alienations, in prejudice of creditors, and against the authors and partakers of such fraude ; statutes, ordaines, and declares, That in all actions, and causes depending, or to be intended by any true creditor, for recoverie of his just debt, or satisfaction of his lawful action and right : They will decreete and decerne, all alienations, dispositions, assignations, and translations whatsoever, made by the debtor, of any of his lands, teindes, reversions, actions, debtes, or goods whatsoever, to any conjunct or confident person, without true, just, and necessarie causes, and without a just price really payed, the same beeing done after the contracting of lawful debts from true creditors : To have beene from the beginning, and to be in all times comming, null, and of none availe, force, nor effect : at the instance of the true and just creditor, by way of action, exception, or reply : without further declarator. And in case any of His Majesties good subjectes (no wayes partakers of the saids fraudes) have lawfully purchased any of the saids bankrupts landes or goods, by true bargaines, for just and competent pryces, or in satisfaction of their lawful debts, from the interposed persons, trusted by the saids dyvours. In that case, the right lawfully acquired by him who is no-wayes partaker of the fraude, shall not be annulled in manner foresaid. But the receiver of the pryce of the saids lands, goods and others, from the buyer, shall be holden and obliged to make the same forth-comming to the behoove of the bankruptes trew creditors, in payment of their lawful debts. And it shall be sufficient probation of the fraud intended against the creditors, if they, or any of them, shall be able to verifie by writte, or by oath, of the partie receiver of any securitie from the dyvour or bankrupt, that the same was made without any true, just, and necessarie cause, or without any true and competent price : Or that the landes and goods of the dyvour and bankrupt beeing sold by him who bought them from the said dyvour, the whole, or the most part of the price thereof was converted, or to be converted to the bankruptes profite and use. Providing alwayes, that so much of the saids landes and goods, or prices thereof so trusted by bankrupts to interposed persons, as hath beene really payed, or assigned by them to any of the bankrupts lawful creditors, shall be allowed unto them, they making the rest forth-comming to the remanent creditors, who want their due payments. And if in time comming any of the saids dyvours, or their interposed partakers of their fraude, shall make any voluntarie payment or right to any person, in defraude of the lawful, and more timely diligence of another creditor, having served inhibition, or used horning, arreastment, comprizing, or other lawful meane, duely to affect the dyvours lands, or goods, or price thereof to his behoove. In that case the said dyvour, or interposed person, shall be holden to make the same forth-comming to the creditor, having used his first lawful diligence : who shall likewise bee preferred to the concreditor, who beeing posterior unto him in diligence, hath obtained payment by the partial favour of the debtor, or of his interposed confident : and shall have good action to

recover from the said creditor that which was voluntarily payed in defraude of the persuers diligence.

Finally, the Lordes declares all such bankrupts, and dyvours, and all interposed persons, for covering or executing their frauds, and all others, who shall give counsel, and wilful assistance unto the saids bankrupts, in the devising and practising of their saids fraudes and godlesse deceits, to the prejudice of their true creditors, shall be reputed and holden dishonest, false and infamous persons, incapable of all honours, dignities, benefices, and offices: Or to passe upon inqueistes, or assyses: Or to beare witnesse in judgement, or outwith in any times coming.

Act for declaring Nottour Bankrupt.

[1696, c. 5.]

OUR SOVERAIGN LORD considering that notwithstanding of the Acts of Parliament already made against fraudfull alienations by bankrupts in prejudice of their creditors yet their frauds and abuses are still very frequent Does therfor and for the better restraining and obviating thereof in time comeing with advice and consent of the Estates of Parliament statute and declare That for hereafter if any debtor under diligence by horning & caption at the instance of his creditor be either imprisoned or retire to the Abbay or any other privileged place or flee or abscond for his personall security or defend his person by force and be afterwards found by sentence of the Lords of Session to be insolvent shall be holden and repute on these three joint grounds viz. diligence by horning and caption and insolvencie joyned with one or other of the said alternatives of imprisonment or retireing or fleeing or absconding or forcible defending to be a nottour bankrupt and that from the time of his forsaid imprisonment retireing fleeing absconding or forcible defending Which being found by sentence of the Lords of Session at the instance of any of his just creditors who are hereby empowered to raise and prosecute a declarator of bankrupt thereanent His Majestie with consent of the Estates of Parliament Declares all and whatsoever voluntar dispositions assignations or other deeds which shall be found to be made or granted directly or indirectly be the forsaid dyvor or bankrupt either at or after his becomeing bankrupt or in the space of sixty dayes of befor in favors of any of his creditors either for their satisfaction or farther security in preference to other creditors to be voyd and null: Likeas it is declared that all dispositions heretable bonds or other heretable rights whereupon infetment may follow granted by the forsaid bankrupts shall only be reckoned as to this case of bankrupt to be of the date of the sasine lawfully taken thereon but prejudice to the validity of the said heretable rights as to all other effects as formerly And because infetments for relief not only of debts already contracted but of debts to be contracted for thereafter are often found to be the occasion or covert of frauds It is therfor farder declared That any disposition or other rights that shall be

granted for hereafter for relieff or security of debts to be contracted for the future shall be of no force as to any such debts as shall be found to be contracted after the sasine or infeftment following on the said disposition or right but prejudice to the validity of the said disposition and right as to other points as accords And lastly His Majestie and the Estates of Parliament do hereby statute and ordain That if any person shall for hereafter defraud his creditors and be found by sentence of the Lords to be a fraudulent bankrupt the degree of his fraud shall also be determined by the same sentence and the person guilty not only held to be infamous Infamia Juris, but also be by them punished by banishment or otherwayes (death excepted) as they shall see cause And the Lords of Session are hereby discharged to dispense any bankrupt as to the habit unless in the summonds and proces of cessio the bankrupts failing through misfortune be lybelled sustained and proven And this but prejudice of all former Acts anent bankrupts which are still to stand in their full force.

An Act to abolish Imprisonment for Debt, and to provide for the better Punishment of Fraudulent Debtors in Scotland; and for other purposes.

[43 & 44 Vict. c. 34, 7th September, 1880.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the Debtors (Scotland) Act, 1880.

2. This Act shall extend to Scotland only.

3. This Act shall come into operation on the first day of January one thousand eight hundred and eighty-one, which day is hereinafter referred to as the commencement of this Act.

Abolition of Imprisonment for Debt.

4. With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be apprehended or imprisoned on account of any civil debt.

There shall be excepted from the operation of the above enactment,—

1. Taxes, fines, or penalties due to Her Majesty, and rates and assessments lawfully imposed or to be imposed;

2. Sums decerned for aliment:

Provided that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than twelve months.

Nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against

him as being in meditatione fugæ, or under any decree or obligation ad factum præstandum.

5. Where any person is, at the commencement of this Act, in custody under a warrant of imprisonment, or other process in any case in which he would not be liable to be apprehended or imprisoned after the commencement of this Act, such person shall, at the commencement of this Act, be discharged from such custody; but his apprehension, imprisonment, or discharge shall not affect the other rights or remedies of any creditor for enforcing the payment of any money due to him.

Notour Bankruptcy.

6. In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or, where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made.

Nothing in this section contained shall affect the provisions of section seven of the Bankruptcy (Scotland) Act, 1856.

Cessio bonorum.

7. Any debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act, 1856, or of this Act, may present a petition for decree of cessio bonorum, in the same manner and subject to the same provisions and conditions, as nearly as may be, in and subject to which a person now entitled to apply for decree of cessio bonorum may do so under the Acts of Parliament enumerated in the schedule hereto annexed, hereinafter called the Cessio Acts; and the provisions of the Cessio Acts shall apply, as nearly as may be, to such petition and the procedure thereunder, subject to the provisions hereinafter contained.

8. Any creditor of a debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act, 1856, or of this Act, may present a petition to the sheriff of the county in which such debtor has his ordinary domicile, setting forth that he (the debtor) is unable to pay his debts, and praying that he may be decerned to execute a disposition omnium bonorum for behoof of his creditors, and that a trustee be appointed who shall take the management and disposal of his estate for such behoof, and such process shall be taken and deemed to be a process of cessio. In the petition there shall be inserted a list of all the creditors of the debtor, specifying their names, designations, and places of residence, so far as known to the petitioner, and with the petition shall be produced evidence that the debtor is notour bankrupt.

9. On such petition being presented the following provisions shall have effect;

1. The sheriff, if he is satisfied that there is *prima facie* evidence of notour bankruptcy, shall issue a warrant appointing the petitioner to publish a notice in the 'Edinburgh Gazette,' intimating that such petition has been presented, and requiring all the creditors to appear in court on a certain day, being not less than thirty days from the date of the 'Gazette' notice, the petitioner being bound, within five days after the date of such notice, to send letters to all the creditors specified in the petition, containing a copy of the said notice, and the sheriff shall further ordain the debtor to appear on the day so appointed for the compearance of the creditors in the presence of the sheriff for public examination ; and the debtor shall, on or before the sixth lawful day prior to the day so appointed, lodge, to be patent to all concerned, a state of his affairs subscribed by himself, and all his books, papers, and documents relating to his affairs, in the hands of the sheriff-clerk ; and the petitioner shall, on or before the same date, lodge in the hands of the sheriff-clerk a copy of the said 'Gazette,' and a certificate subscribed by his agent, or by a messenger-at-arms, or sheriff-officer, and a witness, stating the date and the place where the letters to the creditors were put into the post office, and that they were severally addressed as specified in the petition.
2. On the day appointed for the compearance of the creditors the debtor shall appear in public court in presence of the sheriff for examination as to his affairs, and the sheriff shall have power to put him on oath or affirmation, as the case may be, and the debtor shall be bound to answer all pertinent questions put to him by the sheriff, or by any creditor with the approbation of the sheriff, and it shall be competent for the sheriff to adjourn the examination for such time as to him shall appear fit and reasonable ; and the provisions of section ninety-three of the Bankruptcy (Scotland) Act, 1856, shall, as nearly as may be, apply to the examination of debtors, and the production of books, deeds, or other documents by them, under this Act.
3. The sheriff shall, on such examination being taken, allow a proof to the parties, if it shall appear necessary, and hear parties *vivâ voce*, and either grant decree decerning the debtor to execute a disposition *omnium bonorum* to a trustee for behoof of his creditors, or refuse the same in *hoc statu*, or make such other order as the justice of the case requires. The trustee shall be nominated by the sheriff on the suggestion of the creditors represented at the meeting for examination, and if they do not agree on a person, the sheriff shall make his own selection.
4. Any judgment or interlocutor, or decree, pronounced in such petition may be reviewed on appeal in the same form and subject to the like provisions, restrictions, and conditions as are by law provided in regard to appeals against any judgment

or interlocutor, or decree, pronounced in any other process of cessio bonorum.

5. Until the debtor shall execute a disposition omnium bonorum for behoof of his creditors, any decree decerning him to do so shall operate as an assignation of his moveables in favour of any trustee mentioned in the decree for behoof of such creditors.
6. The expense of obtaining the decree and of the disposition omnium bonorum shall be paid out of the readiest of the funds thereby conveyed.

Miscellaneous.

10. At least once in every four weeks it shall be the duty of the governor or principal officer in charge of every prison in Scotland to make a report to the sheriff of the county within which such prison is situated, setting forth the name and designation of every civil prisoner detained in such prison, the ground of and warrant for his imprisonment, and the period for which he has been so detained; and it shall be lawful for the sheriff to direct any civil prisoner to be brought before him, and, if he shall think fit, the sheriff may determine that the assistance of one of the procurators for the poor shall be afforded to such prisoner in raising a process of cessio bonorum.

11. No fee fund or other dues of court shall be exigible in respect of any proceedings under the Cessio Acts or this Act; nor shall any stamp duty or other Government duty be exigible in respect of any disposition which the debtor shall be required or decerned to execute in terms thereof, any law or statute to the contrary notwithstanding.

12. The sheriff shall have power, upon cause shown by any creditor, or without any application if he shall think fit, at any time after the presentation of a petition for sequestration under the Bankruptcy Act, 1856, or for cessio, to grant warrant to take possession of and put under safe custody any bank notes, money, bonds, bills, cheques, or drafts, or other moveable property belonging to or in possession of the debtor; and, if necessary for that purpose, to open lockfast places, and to search the dwelling-house and person of the debtor.

Punishment of Fraudulent Debtors.

13. The debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, and on conviction before the court of justiciary, or before the sheriff and a jury, shall be liable to be imprisoned for any time not exceeding two years, or by the sheriff without a jury for any time not exceeding sixty days, with or without hard labour:

(A.) In each of the cases following unless he proves to the satisfaction of the court that he had no intent to defraud; that is to say,

1. If he does not to the best of his knowledge and belief, fully and truly disclose the state of his affairs in terms of the Bankruptcy (Scotland) Act, 1856, or the Cessio Acts, as the case may be:

2. If he does not deliver up to the trustee all his property, and all books, documents, papers, and writings relating to his property or affairs which are in his custody or under his control, and which he is required by law to deliver up, or if he does not deal with and dispose of the same according to the directions of the trustee :

3. If after the presentation of the petition for sequestration or cessio, or within four months next before such presentation, he conceals any part of his property, or conceals, destroys, or mutilates, or is privy to the concealment, destruction, or mutilation of any book, document, paper, or writing relating to his property or affairs :

4. If after, or within the time above specified, he makes or is privy to the making of any false entry in, or otherwise falsifying any book, document, paper, or writing affecting or relating to his property or affairs :

5. If within four months next before the presentation of the petition for sequestration or cessio he pawns, pledges, or disposes of, otherwise than in the ordinary way of trade, any property which he has obtained on credit and has not paid for :

6. If, being indebted to an amount exceeding two hundred pounds at the date of the presentation of the petition for sequestration or cessio, as the case may be, he has not, for three years next before such date, kept such books or accounts as, according to the usual course of any trade or business in which he may have been engaged, are necessary to exhibit or explain his transactions :

(B.) In each of the cases following :

1. If, knowing or believing that a false claim has been made by any person under the sequestration, he fails for the period of a month from the time of his acquiring such knowledge or belief to inform the trustee thereof :

2. If after the presentation of the petition for sequestration or cessio, or at any meeting of his creditors within four months next before such presentation, he attempts to account for any part of his property by fictitious losses or expenses :

3. If within four months next before the presentation of the petition for sequestration or cessio he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same :

4. If, after the date of granting sequestration or cessio, or within four months prior thereto, he absconds from Scotland, or makes preparations to abscond for the purpose of avoiding examination or other proceedings at the instance of his creditors, or taking with him property which ought by law to be divided amongst his creditors to the amount of twenty pounds or upwards, or if he fails, having no reasonable excuse (after receiving due notice), to attend

the public examination appointed by the lord ordinary or the sheriff, or to submit himself for examination in terms of the statutes :

5. If, being insolvent, and with intent to defraud his creditors, or any of them, he makes or causes to be made any gift, delivery, or transfer of or any charge on or affecting his property.

14. If any creditor under any petition for sequestration or cessio, or disposition omnium bonorum, wilfully, and with intent to defraud, makes any false claim, or makes or tenders any proof, affidavit, declaration, or statement of account which is untrue in any material particular, he shall be deemed guilty of a crime and offence, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour.

15. It shall be the duty of the trustee in any process of sequestration or cessio to report all offences under this Act to the presiding judge, who shall, on such representation or of his own motion, direct information in all such cases as he thinks ought to be prosecuted, to be laid before the Lord Advocate, who shall direct such inquiry and take such proceedings as he shall think fit.

16. Where any person is liable under any other Act of Parliament or at common law to any punishment or penalty for any offence made punishable by this Act, such person may be proceeded against under such other Act of Parliament or at common law or under this Act, so that he be not punished twice for the same offence.

SCHEDULE.

6 & 7 Will. IV. c. 56.

39 & 40 Vict. c. 70, § 26.

An Act to amend the Bankruptcy Acts and Cessio Acts with respect to the discharge of Bankrupt Debtors in Scotland, and in certain other respects.

[44 & 45 Vict. c. 22, 18th July, 1881.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited for all purposes as the Bankruptcy and Cessio (Scotland) Act, 1881.

2. This Act shall extend to Scotland only.

3. This Act shall commence to have effect on the first day of January one thousand eight hundred and eighty-two, which date is hereinafter referred to as the commencement of this Act.

4. The expression "the Bankruptcy Acts" means the Bankruptcy (Scotland) Act, 1856, and any Act amending the same.

The expression "the Cessio Acts" shall include the Act passed in the session of the sixth and seventh years of the reign of his Majesty King William the Fourth, chapter fifty-six, the Sheriff Court (Scotland) Act, 1876, section twenty-six, the Debtors (Scotland) Act, 1880, this Act, and any Act amending the same.

The expression "decree of Cessio bonorum" shall include a decree decerning a debtor to execute a disposition omnium bonorum in terms of the Debtors (Scotland) Act, 1880.

The word "sheriff" in this Act and in the Debtors (Scotland) Act, 1880, includes sheriff-substitute.

5. A debtor with respect to whom a decree of Cessio bonorum has been pronounced shall be entitled on the expiration of six months from the date of such decree to apply to the sheriff to be finally discharged of all debts contracted by him before the date of such decree; and the provisions of the one hundred and forty-sixth section of the Bankruptcy (Scotland) Act, 1856, with regard to the conditions on which a bankrupt shall be entitled to obtain his discharge at the expiration of six months, twelve months, eighteen months, and two years respectively from the date of sequestration shall, subject to the qualifications hereinafter contained, apply to debtors with respect to whom decree of cessio bonorum has been pronounced: Provided, that in applying the provisions of the said section, the date of the decree of cessio bonorum shall be substituted for the date of awarding sequestration; and that it shall not be necessary to convene a meeting of creditors with reference to such discharge, but the consents required shall be given in writing and produced to the sheriff in such application for discharge.

A deliverance by the sheriff granting, postponing, or refusing a discharge under this section shall be final and not subject to review.

6. Notwithstanding anything contained in the Bankruptcy Acts, the following provisions shall have effect with respect to bankrupts undischarged at the commencement of this Act, and to bankrupts whose estates may be thereafter sequestrated; that is to say,

(1.) A bankrupt shall not at any time be entitled to be discharged of his debts, unless it is proved to the Lord Ordinary or the sheriff, as the case may be, that one of the following conditions has been fulfilled:

(a.) That a dividend or composition of not less than five shillings in the pound has been paid out of the estate of the bankrupt, or that security for payment thereof has been found to the satisfaction of the creditors; or

(b.) That the failure to pay five shillings in the pound, as aforesaid, has in the opinion of the Lord Ordinary or the sheriff, as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible:

(2.) In order to determine whether either of the foresaid conditions has been fulfilled, the Lord Ordinary or the sheriff, as the case may be, shall have power to require the bankrupt to

submit such evidence as he may think necessary, in addition to the declarations or oaths, as the case may be, made by the bankrupt under sections one hundred and forty and one hundred and forty-seven of the Bankruptcy (Scotland) Act, 1856, and the report made by the trustee under section one hundred and forty-six of the said Act, and to allow any objecting creditor or creditors such proof as he may think right:

- (3.) Any deliverance of the Lord Ordinary or sheriff, as the case may be, under this section shall be subject to appeal in the manner provided in sections one hundred and seventy-one and one hundred and seventy of the Bankruptcy (Scotland) Act, 1856: Provided always, that the judgment of the Inner House of the Court of Session on any such appeal shall be final and not subject to review:
- (4.) In the event of a discharge being refused under the provisions of this section the bankrupt shall at any time, if his estate shall yield or he shall pay to his creditors such additional sum as will, with the dividend or composition previously paid out of his estate during the sequestration, make up five shillings in the pound, be entitled to apply for and obtain his discharge in the same manner as if a dividend of five shillings in the pound had originally been paid out of his estate.

7. Notwithstanding anything contained in the Cessio Acts, the following provisions shall have effect in the case of debtors with respect to whom decree of Cessio bonorum has been pronounced; that is to say,

- (1.) A debtor shall not be entitled to be discharged of his debts unless it is proved to the sheriff that one of the following conditions has been fulfilled:
 - (a.) That a dividend of five shillings in the pound has been paid out of the estate of the debtor, or that security for payment thereof has been found to the satisfaction of the creditors; or
 - (b.) That the failure to pay five shillings in the pound as aforesaid has in the opinion of the sheriff arisen from circumstances for which the debtor cannot justly be held responsible:
- (2.) In order to determine whether either of the foresaid conditions has been fulfilled the sheriff shall have power to require the debtor to submit such evidence as he may think necessary, and to allow any objecting creditor or creditors such proof as he may think right:
- (3.) In the event of a discharge being refused under the provisions of this section the debtor shall at any time, if his estate shall yield or he shall pay to his creditors such additional sum as will, with the dividend previously paid out of his estate during the said proceedings, make up five shillings in the pound, be entitled to apply for and obtain his discharge

in the same manner as if a dividend of five shillings in the pound had originally been paid out of his estate.

8. After a final division of the funds the trustee, in a process of *cessio*, may apply to the accountant in bankruptcy for a certificate that he is entitled to his discharge, and shall lay before him the sederunt book and accounts, with a list of unclaimed dividends, and the accountant may, if he thinks proper, order intimation to be made to the creditors, and shall, if he is satisfied that the trustee has complied with the provisions of the one hundred and forty-seventh section of the Bankruptcy (Scotland) Act, 1856, and is otherwise entitled to be discharged, and upon payment of any unclaimed dividends into the account of unclaimed dividends kept in the name of the accountant, grant to the trustee a certificate under his hand to that effect, and such certificate shall have to all intents and purposes the effect of a decree of exoneration and discharge by a court of competent jurisdiction.

9. If the debtor fail to appear in obedience to the citation under a process of *Cessio bonorum* at any meeting to which he has been cited, and, if the sheriff shall be satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of *Cessio bonorum*.

10. In any proceedings under the *Cessio Acts* it shall be competent for the sheriff, for the purpose of securing the attendance and examination of the debtor, or of any person who can give information relative to the debtor's estate, to exercise all the powers and to grant the warrants and commissions which in processes of sequestration he is empowered to exercise or to grant under the eighty-eighth, ninetieth, and ninety-first sections of the Bankruptcy (Scotland) Act, 1856.

11. If in any proceedings under the *Cessio Acts*, where the liabilities of the debtor exceed the sum of two hundred pounds, it shall appear to the sheriff that it is expedient, having regard to the value of the debtor's estate and the whole circumstances of the case, that the distribution of the estate should take place under the provisions of the Bankruptcy Acts, he shall have power forthwith to award sequestration of the estates which then belong or shall thereafter belong to the debtor before the date of the discharge and declare the estates to belong to the creditors for the purposes of the Bankruptcy Acts; and thereupon the provisions of the said Acts shall apply as if sequestration had been awarded upon a petition for sequestration in terms of section twenty-nine of the Bankruptcy (Scotland) Act, 1856.

The sheriff shall have power to direct that the expenses *bonâ fide* incurred by a creditor in any proceedings under the *Cessio Acts* superseded by the awarding of sequestration shall be paid by the trustee in the sequestration out of the readiest funds of the bankrupt.

12. Notwithstanding any law or usage to the contrary, it shall be lawful for the sheriff to appoint any diet of compareance or any meeting or proceeding under the *Cessio Acts* to be held on an *inducie* of any number of days not being less than eight.

This provision shall not be held to limit any power now possessed by the sheriff.

13. In section twelve of the Debtors (Scotland) Act, 1880, the

word "dwelling-house" shall be held to include shop, counting-house, warehouse, or other premises.

14. This Act shall be read and construed together with the Debtors (Scotland) Act, 1880.

Act anent Principals and Cautioners.

[1695, c. 5.]

HIS MAJESTY and the Estates of Parliament considering the great hurt and prejudice, that hath befallen many persons and families and oft times to their utter ruine and undoing, by mens facility to engage as cautioners for others, who afterwards failing, have left a growing burden on their cautioners, without relief. Therefore, and for remead therof, His Majesty, with advice forsaid statutes & ordains, That no man binding and engaging for hereafter, for and with another conjunctly and severally, in any bond or contracts for sums of money, shall be bound for the said sums for longer than seven years after the date of the bond, but that from and after the said seven years, the said cautioner shall be eo ipso free of his caution. And that whoever is bound for another either as express cautioner, or as principal or co-principal, shall be understood to be a cautioner, to have the benefit of this Act, providing that he have either clause of relief in the bond, or a bond of relief a part, intimat personally to the creditor at his receiving of the bond, without prejudice always to the true principals, being found in the whole contents of the bond or contract; As also of the said cautioners being still bound, conform to the terms of the bond within the said seven years, as before the making of this Act; As also providing, that what legal diligence, by inhibition, horning, arrestment, adjudication, or any other way, shall be done within the seven years, by creditors against their cautioners, for what fell due in that time, shall stand good, and have its course and effect, after the expiring of the seven years, as if this Act had not been made.

Act anent Blank Bonds and Trusts.

[1696, c. 25.]

OUR SOVERAIGN LORD considering that the subscribeing of bonds assignations and dispositions and other deeds blank in the name of the person in whose favors they are granted as also that the intrusting of persons without any declaration or backbond of trust in writing from the persons intrusted are occasions of fraud as also of many pleas and contentions Doth therefore with advice and consent of the Estates of Parliament statute and ordain That for hereafter no bonds assignations dispositions or other deeds be subscribed blank in the person or persons name in whose favors they are conceived and that the forsaid person or persones be either insert before or at

the subscribing or at least in presence of the same witnesses who were witnesses to the subscribing before the delivery certifieing that all writs otherwayes subscribed and delivered blank as said is shall be declared null, And farder that no action of declarator of trust shall be sustained as to any deed of trust made for hereafter except upon a declaration or backbond of trust lawfully subscribed by the person alleadged to be the trustee and against whom or his heirs or assigneyes the declarator shall be intended or unless the same be referred to the oath of party simpliciter Declaring that this Act shall not extend to the indorsation of bills of exchange or the notes of any tradeing company.

An Act to amend the Law relating to Bills of Lading.

[18 & 19 Vict. c. 111, 14th August, 1855.]

WHEREAS by the custom of merchants a bill of lading of goods being transferable by indorsement the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property: And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bonâ fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2. Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.

3. Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time

of receiving the same that the goods had not been in fact laden on board: Provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

An Act to amend the Laws of Scotland affecting Trade and Commerce.

[19 & 20 Vict. c. 60, 21st July, 1856.]

WHEREAS inconvenience is felt by persons engaged in trade by reason of the laws of Scotland being in some particulars different from those of England and Ireland in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience, it is expedient to amend the law of Scotland as hereinafter is mentioned: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser.

2. Where a purchaser of goods who has not obtained delivery thereof shall after the passing of this Act sell the same, the purchaser from him or any other subsequent purchaser shall be entitled to demand that delivery of the said goods shall be made to him and not to the original purchaser; and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery, on payment of the price of such goods, or performance of the obligations or conditions of the contract of sale, and shall not be entitled, in any question with a subsequent purchaser, or others in his right, to retain the said goods, for any separate debt or obligation alleged to be due to such seller by the original purchaser: Provided always, that nothing in this Act contained shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid, or for performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller, except as between him and such subsequent purchaser, or any such right of retention arising from express contract with the original purchaser.

3. Any seller of goods may attach the same while in his own hands or possession, by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

4. Nothing hereinbefore contained shall prejudice or affect the landlord's right of hypothec and sequestration for rent.

5. Where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose.

6. From and after the passing of this Act, all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect.

7. No guarantee, security, cautionary obligation, representation, or assurance granted or made after the passing of this Act to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same in respect of anything done or omitted to be done, after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted or made, or of the company or firm for which the same has been granted or made: Unless the intention of the parties that such guarantee, security, cautionary obligation, representation, or assurance shall continue to be binding, notwithstanding such change, shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise.

8. Where any person shall, after the passing of this Act, become bound as cautioner for any principal debtor, it shall not be necessary for the creditor to whom such cautionary obligation shall be granted, before calling on the cautioner for payment of the debt to which such cautionary obligation refers, to discuss or do diligence against the principal debtor, as now required by law; but it shall be competent to such creditor to proceed against the principal debtor and the said cautioner, or against either of them, and to use all action or diligence against both or either of them which is competent accord-

ing to the law of Scotland: Provided always, that nothing herein contained shall prevent any cautioner from stipulating in the instrument of caution that the creditor shall be bound before proceeding against him to discuss and do diligence against the principal debtor.

9. From and after the passing of this Act, where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of such cautioners without the consent of the other cautioners shall be deemed and taken to be a discharge granted to all the cautioners; but nothing herein contained shall be deemed to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may have become bankrupt.

10. From and after the passing of this Act, where any bill of exchange or promissory note shall be issued without date, it shall be competent to prove by parole evidence the true date at which such bill or note was issued: Provided always that summary diligence shall not be competent on any bill or note issued without a date.

11. No acceptance of any bill of exchange, whether inland or foreign, made after the thirty-first day of December one thousand eight hundred and fifty-six, shall be sufficient to bind or charge any person unless the same be in writing on such bill, or if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorised by him.

12. Every bill of exchange drawn in any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of Her Majesty, and made payable in or drawn upon any person resident in any part of the said United Kingdom or islands, shall be deemed to be an inland bill; but nothing herein contained shall alter or affect the stamp duty, if any, which but for this enactment would be payable in respect of any such bill.

13. From and after the passing of this Act, where any inland bill of exchange shall be presented for acceptance or payment, and the same shall be dishonoured by not being accepted or paid, or where any promissory note shall be presented for payment, and dishonoured by not being paid, it shall not be necessary that a notarial protest shall be taken on such bill of exchange or promissory note in order to preserve recourse against the drawer or indorser of such bill or promissory note respectively; but it shall be sufficient to prove such presentment and dishonour, to the effect of preserving recourse as aforesaid by other competent evidence, either written or parole: Provided always, that nothing herein contained shall be taken to affect the necessity for a notarial protest in order to entitle the holder of any bill or note to proceed with summary diligence thereon.

14. Where any inland bill of exchange shall be presented for acceptance or payment, and such acceptance or payment shall be refused, or where any promissory note shall be presented for payment, and payment shall be refused, notice of the dishonour of such bill or promissory note by such refusal to accept or pay shall, in order to entitle the holder to have recourse to any other party, be given in the

same manner and within the same time as is required in the case of foreign bills by the law of Scotland.

15. Where any bill or note has been lost, stolen, or fraudulently obtained, the holder of such bill or note suing or doing diligence thereon shall be bound to prove that value was given by him for the same; but such proof may be made by parole evidence.

16. When any bill of exchange or promissory note shall, after the passing of this Act, be indorsed after the period when such bill of exchange or promissory note became payable, the indorsee of such bill or note shall be deemed to have taken the same subject to all objections or exceptions to which the said bill or note was subject in the hands of the indorser.

17. From and after the passing of this Act, all carriers for hire of goods within Scotland shall be liable to make good to the owner of such goods all losses arising from accidental fire while such goods were in the custody or possession of such carriers.

18. In relation to the rights and remedies of persons having claims for repairs done to or supplies furnished to or for ships, every port within the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of Her Majesty, shall be deemed a home port.

19. The Court of Session is hereby empowered from time to time, after the passing of this Act, to make such regulations by Act or Acts of Sederunt as the said Court may deem meet for carrying into effect the purposes of this Act: Provided always, that within fourteen days from the commencement of any future session of Parliament there shall be transmitted to both Houses of Parliament copies of all Acts of Sederunt made and passed under the powers hereby given.

20. In citing this Act it shall be sufficient to use the expression, "The Mercantile Law Amendment Act (Scotland), 1856."

21. Nothing in this Act contained shall apply to any part of the United Kingdom except Scotland.

An Act to declare the law relating to the Acceptance of Bills of Exchange.

[41 Vict. c. 13, 16th April, 1878.]

WHEREAS by the Mercantile Law Amendment Act, 1856, and the Mercantile Law Amendment Act (Scotland), 1856, it is enacted that "no acceptance of any bill of exchange, whether inland or foreign, made after the 31st day of December, 1856, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or if there be more than one part of such bill on one of the said parts, and signed by the acceptor or some person duly authorised by him":

And whereas doubts have arisen as to the true effect and intention of the said enactment, and as to whether the signature of the drawee

alone can constitute a sufficient acceptance of the bill so as to satisfy the requirements of the said Statute, and it is expedient that the meaning of the said enactment should be further declared :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. An acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said Statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill.

2. Nothing in this Act shall affect the validity or invalidity of any verdict or judgment recovered or given before the passing of this Act.

3. This Act may be cited for all purposes as the Bills of Exchange Act, 1878.

An Act to facilitate the Transmission of Moveable Property in Scotland.

[25 & 26 Vict. c. 85, 7th August, 1862.]

WHEREAS it is expedient to facilitate the transmission of moveable estate in Scotland: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. From and after the passing of this Act, it shall be competent to any party, in right of a personal bond or of a conveyance of moveable estate, to assign such bond or conveyance by assignation in or as nearly as may be in the form set forth in Schedule A. hereto annexed ; and it shall be competent to write the assignation or assignations on the bond or conveyance itself in or as nearly as may be in the form set forth in Schedule B. hereto annexed ; which assignation shall be registrable in the books of any Court, in terms of any clause of registration contained in the bond or conveyance so assigned ; and such assignation, upon being duly stamped and duly intimated, shall have the same force and effect as a duly stamped and duly intimated assignation according to the forms at present in use.

2. An assignation shall be validly intimated (1) by a notary public delivering a copy thereof, certified as correct, to the person or persons to whom intimation may in any case be requisite, or (2) by the holder of such assignation, or any person authorised by him, transmitting a copy thereof certified as correct by post to such person ; and (in the first case) a certificate by such notary public in or as nearly as may be in the form set forth in Schedule C. hereto annexed, and (in the second case) a written acknowledgment by the person to whom such copy may have been transmitted by post as aforesaid of the receipt of the copy, shall be sufficient evidence of such intimation

having been duly made: Provided always, that if the deed or instrument containing such assignation shall likewise contain other conveyances or declarations of trust purposes, it shall not be necessary to deliver or transmit a full copy thereof, but only a copy of such part thereof as respects the subject matter of such assignation.

3. Nothing in this Act contained shall prevent the transmission of any personal bond or conveyance of moveable estate, or the intimation of any assignation according to the forms at present in use.

4. The following words in this Act, and in the Schedules annexed to this Act, shall have the several meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; that is to say, the word "bond" and the word "conveyance" shall extend to and include personal bonds for payment or performance, bonds of caution, bonds of guarantee, bonds of relief, bonds and assignations in security of every kind, decreets of any court, policies of assurance of any assurance company or association in Scotland, whether held by parties resident in Scotland or elsewhere, protests of bills or of promissory notes, dispositions, assignations, or other conveyances of moveable or personal property or effects, assignations, translations, and retrocessions, and also probative extracts of all such deeds from the books of any competent court; the word "assignation" shall also include translations and retrocessions, and probative extracts thereof; the words "moveable estate" shall extend to and include all personal debts and obligations, and moveable or personal property or effects of every kind.

5. This Act may be cited for all purposes as the "Transmission of Moveable Property (Scotland) Act, 1862."

SCHEDULE A.

I *A B*, in consideration of, &c. [*or otherwise, as the case may be*], do hereby assign to *C D* and his heirs or assignees [*or otherwise, as the case may be*], the bond [*or other deed, describing it*], granted by *E F*, dated, &c., by which [*here specify the nature of the deed, and specify also any connecting title, and any circumstances requiring to be stated in regard to the nature and extent of the right required*].—In witness whereof, &c.

[*Insert testing clause in usual form.*]

SCHEDULE B.

I *A B*, in consideration of, &c. [*or otherwise, as the case may be*], do hereby assign to *C D* and his heirs or assignees [*or otherwise, as the case may be*], the foregoing [*or within-written*] bond [*or other writ or deed, describing it*], granted in my favour [*or otherwise, as the case may be, specifying any connecting title, and any circumstances requiring to be stated in regard to the nature and extent of the right assigned*].—In witness whereof, &c.

[*Insert testing clause in usual form.*]

SCHEDULE C.

I (A) _____ of the city of _____
 Notary Public, do hereby attest and declare, That upon the
 _____ day of _____ and between
 the hours of _____ and _____ I duly intimated to B
 [here describe the party] the within-written assignation [or otherwise,
 as the case may be], or an assignation granted by [here describe it],
 and that by delivering to the said A personally [or otherwise] by
 leaving for the said A within his dwelling-house at E in the
 hands of [here describe the party], a full copy thereof [or if a partial
 copy here quote the portion of the deed which has been delivered], to
 be given to him; all of which was done in presence of C and D
 [here name and describe the two witnesses], who subscribe this
 attestation along with me.—In witness whereof.
 [Insert testing clause in usual form, to be subscribed by the party
 and the two witnesses.]

An Act for Amending the Law relating to Crossed Cheques.

[39 & 40 Vict. c. 81, 15th August, 1876.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited as The Crossed Cheques Act, 1876.
2. The Acts described in the schedule to this Act are hereby repealed, but this repeal shall not affect any right, interest, or liability acquired or accrued before the passing of this Act.

3. In this Act—

“Cheque” means a draft or order on a banker payable to bearer or to order on demand, and includes a warrant for payment of dividend on stock sent by post by the Governor and Company of the Bank of England or of Ireland, under the authority of any Act of Parliament for the time being in force :

“Banker” includes persons or a corporation or company acting as bankers.

4. Where a cheque bears across its face an addition of the words “and company,” or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, and either with or without the words “not negotiable,” that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally.

Where a cheque bears across its face an addition of the name of a banker, either with or without the words “not negotiable,” that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker.

5. Where a cheque is uncrossed, a lawful holder may cross it generally or specially.

Where a cheque is crossed generally, a lawful holder may cross it specially.

Where a cheque is crossed generally or specially, a lawful holder may add the words not negotiable.

Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent for collection.

6. A crossing authorised by this Act shall be deemed a material part of the cheque, and it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing.

7. Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker.

Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or to his agent for collection.

8. Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof.

9. Where the banker on whom a crossed cheque is drawn has in good faith and without negligence paid such cheque, if crossed generally to a banker, and, if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque and (in case such cheque has come to the hands of the payee) the drawer thereof shall respectively be entitled to the same rights, and be placed in the same position in all respects, as they would respectively have been entitled to and have been placed in if the amount of the cheque had been paid to and received by the true owner thereof.

10. Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same shall be crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

11. Where a cheque is presented for payment, which does not at the time of presentation appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, a banker paying the cheque, in good faith and without negligence, shall not be responsible or incur any liability, nor shall the payment be questioned, by reason of the cheque having been crossed, or of the crossing having been obliterated, or having been added to or altered otherwise than as authorised by this Act, and of payment being made otherwise than to a banker or the banker to whom the cheque is or was crossed, or to his agent for collection being a banker (as the case may be).

12. A person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable," shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

But a banker who has in good faith and without negligence received

payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

SCHEDULE.

ACTS REPEALED.

- 19 & 20 Vict. c. 25, . An Act to amend the law relating to drafts on bankers.
 21 & 22 Vict. c. 79, . An Act to amend the law relating to cheques or drafts on bankers.
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An Act for the better Protection of the Property of Merchants and others who may hereafter enter into Contracts or Agreements in relation to Goods, Wares, or Merchandizes intrusted to Factors or Agents.

[4 Geo. IV. c. 83, 18th July, 1823.]

WHEREAS it has been found that the law, as it now stands, relating to goods shipped in the names of persons who are not the actual proprietors thereof, and to the deposit or pledge of goods, affords great facility to fraud, produces frequent litigation, and proves in its effects highly injurious to the interests of commerce in general: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act any person or persons intrusted, for the purpose of sale, with any goods, wares, or merchandise, and by whom such goods, wares, or merchandise shall be shipped in his, her, or their own name or names, or in whose name or names any goods, wares, or merchandise shall be shipped by any other person or persons, shall be deemed and taken to be the true owner or owners thereof, so far as to entitle the consignee or consignees of such goods, wares, and merchandise to a lien thereon, in respect of any money or negotiable security or securities advanced or given by such consignee or consignees to or for the use of the person or persons in whose name or names such goods, wares, or merchandise shall be shipped, or in respect of any money or negotiable security or securities received by him, her, or them to the use of such consignee or consignees, in the like manner to all intents and purposes as if such person or persons was or were the true owner or owners of such goods, wares, and merchandise; provided such consignee or consignees shall not have notice, by the bill of lading for the delivery of such goods, wares, or merchandise, or otherwise, at or before the time of any advance of such money or negotiable security, or of such receipt of money or negotiable security, in respect of which such lien is claimed, that such person or persons so shipping in his, her, or their own name or names,

or in whose name or names any goods, wares, or merchandise shall be shipped by any person or persons, is or are not the actual and *bond fide* owner or owners, proprietor or proprietors of such goods, wares, and merchandise so shipped as aforesaid; any law, usage, or custom to the contrary thereof in anywise notwithstanding: Provided also, that the person or persons in whose name or names any such goods, wares, or merchandise are so shipped as aforesaid, shall be taken for the purposes of this Act to have been intrusted therewith, unless the contrary thereof shall appear or be shown in evidence by any person disputing such fact.

2. AND be it further enacted, that it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any goods, wares, or merchandise, or the bill or bills of lading for the delivery thereof, in deposit or pledge from any consignee or consignees thereof; but then and in that case such person or persons, body or bodies politic or corporate shall acquire no further or other right, title, or interest, in or upon or to the said goods, wares, or merchandise, or any bill of lading for the delivery thereof, than was possessed or could or might have been enforced by the said consignee or consignees at the time of such deposit or pledge as a security as aforesaid; but such person or persons, body or bodies politic or corporate shall and may acquire, possess, and enforce such right, title, or interest, as was possessed and might have been enforced by such consignee or consignees at the time of such deposit or pledge as aforesaid; any rule of law, usage, or custom to the contrary notwithstanding.

3. PROVIDED always, that nothing herein contained shall be deemed, construed, or taken to deprive or prevent the true owner or owners, proprietor or proprietors of such goods, wares, or merchandise, from demanding and recovering the same from his, her, or their factor or factors, agent or agents, before the same shall have been so deposited or pledged, or from the assignee or assignees of such factor or factors, agent or agents, in the event of his, her, or their bankruptcy; nor to prevent any such owner or owners, proprietor or proprietors, from demanding or recovering of and from any person or persons, or of or from the assignees of any person or persons in case of his or her bankruptcy, or of or from any body or bodies politic or corporate, such goods, wares, or merchandise, so consigned, deposited, or pledged, upon repayment of the money, or on restoration of the negotiable security or securities, or on payment of a sum of money equal to the amount of such security or securities, for which money or negotiable security or securities such person or persons, his, her, or their assignee or assignees, or such body or bodies politic or corporate may be entitled to any lien upon such goods, wares, or merchandise; nor to prevent the said owner or owners, proprietor or proprietors from recovering of and from such person or persons, body or bodies politic or corporate, any balance or sum of money remaining in his, her, or their hands as the produce of the sale of such goods, wares, or merchandise, after deducting thereout the amount of the money or negotiable security or securities so advanced or given upon the security

thereof as aforesaid : Provided always, that in case of the bankruptcy of such factor or agent, the owner of the goods so pledged and redeemed as aforesaid shall be held to have discharged *pro tanto* the debt due by him to the bankrupt's estate.

An Act to alter and amend an Act for the better Protection of the Property of Merchants and others who may hereafter enter into Contracts or Agreements in relation to Goods, Wares, or Merchandize intrusted to Factors or Agents.

[6 Geo. IV. c. 94, 5th July, 1825.]

WHEREAS an Act passed in the fourth year of the reign of his present Majesty, intituled "An Act for the better protection of the property " of merchants and others who may hereafter enter into contracts " or agreements in relation to goods, wares, or merchandize intrusted " to factors or agents ": And whereas it is expedient to alter and amend the said Act, and to make further provisions in relation to such contracts or agreements as hereinafter provided : Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act any person or persons intrusted, for the purpose of consignment or of sale, with any goods, wares, or merchandize, and who shall have shipped such goods, wares, or merchandize in his, her, or their own name or names, and any person or persons in whose name or names any goods, wares, or merchandize shall be shipped by any other person or persons, shall be deemed and taken to be the true owner or owners thereof, so far as to entitle the consignee or consignees of such goods, wares, and merchandize to a lien thereon in respect of any money or negotiable security or securities advanced or given by such consignee or consignees to or for the use of the person or persons in whose name or names such goods, wares, or merchandize shall be shipped, or in respect of any money or negotiable security or securities received by him, her, or them to the use of such consignee or consignees, in the like manner to all intents and purposes as if such person or persons was or were the true owner or owners of such goods, wares, and merchandize ; provided such consignee or consignees shall not have notice, by the bill of lading for the delivery of such goods, wares, or merchandize, or otherwise, at or before the time of any advance of such money or negotiable security, or of such receipt of money or negotiable security in respect of which such lien is claimed, that such person or persons so shipping in his, her, or their own name or names, or in whose name or names any goods, wares, or merchandize shall be shipped by any person or persons, is or are not the actual and *bonâ fide* owner or owners, proprietor or proprietors of such goods, wares, and merchandize so shipped as aforesaid ; any law, usage, or custom to the contrary thereof in any-

wise notwithstanding : Provided also, that the person or persons in whose name or names any such goods, wares, or merchandise are so shipped as aforesaid shall be taken, for the purposes of this Act, to have been intrusted therewith for the purpose of consignment or of sale, unless the contrary thereof shall be made to appear by bill of discovery or otherwise, or be made to appear or be shown in evidence by any person disputing such fact.

2. AND be it further enacted, that from and after the first day of October one thousand eight hundred and twenty-six any person or persons intrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, wharfinger's certificate, warrant or order for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, wares, and merchandise described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person or persons so intrusted and in possession as aforesaid, with any person or persons, body or bodies politic or corporate, for the sale or disposition of the said goods, wares, and merchandise, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person or persons, body or bodies politic or corporate, upon the faith of such several documents or either of them : Provided such person or persons, body or bodies politic or corporate, shall not have notice, by such documents or either of them, or otherwise, that such person or persons so intrusted as aforesaid is or are not the actual and *bona fide* owner or owners, proprietor or proprietors, of such goods, wares, or merchandise so sold or deposited or pledged as aforesaid ; any law, usage, or custom to the contrary thereof in anywise notwithstanding.

3. PROVIDED always, and be it further enacted, that in case any person or persons, body or bodies politic or corporate, shall, after the passing of this Act, accept and take any such goods, wares, or merchandise in deposit or pledge from any such person or persons so in possession and intrusted as aforesaid, without notice as aforesaid, as a security for any debt or demand due and owing from such person or persons so intrusted and in possession as aforesaid to such person or persons, body or bodies politic or corporate, before the time of such deposit or pledge, then and in that case such person or persons, body or bodies politic or corporate, so accepting or taking such goods, wares, or merchandise in deposit or pledge, shall acquire no further or other right, title, or interest in or upon or to the said goods, wares, or merchandise, or any such document as aforesaid, than was possessed or could or might have been enforced by the said person or persons so possessed and intrusted as aforesaid at the time of such deposit or pledge as a security as last aforesaid ; but such person or persons, body or bodies politic or corporate, so accepting or taking such goods, wares, or merchandise in deposit or pledge, shall and may acquire, possess, and enforce such right, title, or interest as was possessed and might have been enforced by such person or persons so

possessed and intrusted as aforesaid ; any rule of law, usage, or custom to the contrary notwithstanding.

4. AND be it further enacted, that from and after the first day of October one thousand eight hundred and twenty-six it shall be lawful to and for any person or persons, body or bodies politic or corporate, to contract with any agent or agents intrusted with any goods, wares, or merchandise, or to whom the same may be consigned, for the purchase of any such goods, wares, and merchandise, and to receive the same of and pay for the same to such agent or agents ; and such contract and payment shall be binding upon and good against the owner of such goods, wares, and merchandise, notwithstanding such person or persons, body or bodies politic or corporate, shall have notice that the person or persons making and entering into such contract, or on whose behalf such contract is made or entered into, is an agent or agents, provided such contract and payment be made in the usual and ordinary course of business, and that such person or persons, body or bodies politic or corporate, shall not, when such contract is entered into or payment made, have notice that such agent or agents is or are not authorised to sell the said goods, wares, and merchandise, or to receive the said purchase money.

5. AND be it further enacted, that from and after the passing of this Act it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any such goods, wares, or merchandise, or any such document as aforesaid, in deposit or pledge from any such factor or factors, agent or agents, notwithstanding such person or persons, body or bodies politic or corporate, shall have such notice as aforesaid that the person or persons making such deposit or pledge is or are a factor or factors, agent or agents ; but then and in that case such person or persons, body or bodies politic or corporate, shall acquire no further or other right, title, or interest in or upon or to the said goods, wares, or merchandise, or any such document as aforesaid, for the delivery thereof, than was possessed or could or might have been enforced by the said factor or factors, agent or agents, at the time of such deposit or pledge as a security as last aforesaid ; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess, and enforce such right, title, or interest as was possessed and might have been enforced by such factor or factors, agent or agents, at the time of such deposit or pledge as aforesaid ; any rule or law, usage or custom, to the contrary notwithstanding.

6. PROVIDED always, and be it enacted, that nothing herein contained shall be deemed, construed, or taken to deprive or prevent the true owner or owners or proprietor or proprietors of such goods, wares, or merchandise from demanding and recovering the same from his, her, or their factor or factors, agent or agents, before the same shall have been so sold, deposited, or pledged, or from the assignee or assignees of such factor or factors, agent or agents, in the event of his, her, or their bankruptcy ; nor to prevent such owner or owners, proprietor or proprietors, from demanding or recovering of and from any person or persons, body or bodies politic or corporate, the price or sum

agreed to be paid for the purchase of such goods, wares, or merchandise, subject to any right of set-off on the part of such person or persons, body or bodies politic or corporate, against such factor or factors, agent or agents; nor to prevent such owner or owners, proprietor or proprietors, from demanding or recovering of and from such person or persons, body or bodies politic or corporate, such goods, wares, or merchandise so deposited or pledged, upon repayment of the money or on restoration of the negotiable instrument or instruments so advanced or given on the security of such goods, wares, or merchandise as aforesaid, by such person or persons, body or bodies politic or corporate, to such factor or factors, agent or agents, and upon payment of such further sum of money, or on restoration of such other negotiable instrument or instruments (if any) as may have been advanced or given by such factor or factors, agent or agents, to such owner or owners, proprietor or proprietors, or on payment of a sum of money equal to the amount of such instrument or instruments; nor to prevent the said owner or owners, proprietor or proprietors, from recovering of and from such person or persons, body or bodies politic or corporate, any balance or sum of money remaining in his, her, or their hands as the produce of the sale of such goods, wares, or merchandise, after deducting thereout the amount of the money or negotiable instrument or instruments so advanced or given upon the security thereof as aforesaid: Provided always, that in case of the bankruptcy of any such factor or agent the owner or owners, proprietor or proprietors of the goods, wares, and merchandise so pledged and redeemed as aforesaid, shall be held to have discharged *pro tanto* the debt due by him, her, or them to the estate of such bankrupt.

7. AND whereas it is expedient to prevent the improper deposit or pledge of goods, wares, or merchandise, or the documents relating to such goods, wares, or merchandise, intrusted or consigned as aforesaid to factors or agents: Be it therefore enacted, that if any such factor or agent, at any time from and after the said first day of October one thousand eight hundred and twenty-six, shall deposit or pledge any goods, wares, or merchandise intrusted or consigned as aforesaid to his or her care or management, or any of the said several documents so possessed or intrusted as aforesaid, with any person or persons, body or bodies politic or corporate, as a security for any money or negotiable instrument or instruments borrowed or received by such factor or agent, and shall apply or dispose thereof to his or her own use, in violation of good faith, and with intent to defraud the owner or owners of any such goods, wares, or merchandise, every person so offending in any part of the United Kingdom shall be deemed and taken to be guilty of a misdemeanour, and, being convicted thereof according to law, shall be sentenced to transportation for any term not exceeding fourteen years, or to receive such other punishment as may by law be inflicted on persons guilty of a misdemeanour, and as the court before whom such offender may be tried and convicted shall adjudge.

8. PROVIDED always, and be it further enacted, that nothing herein contained shall extend or be construed to extend to subject any person

or persons to prosecution for having deposited or pledged any goods, wares, or merchandise so intrusted or consigned to him, her, or them, provided the same shall not be made a security for or subject to the payment of any greater sum or sums of money than at the time of such deposit or pledge was justly due and owing to such person or persons from his, her, or their principal or principals: Provided nevertheless, that the acceptance of bills of exchange by such person or persons drawn by or on account of such principal or principals shall not be considered as constituting any part of such debt so due and owing from such principal or principals within the true intent and meaning of this Act, so as to excuse the consequence of such a deposit or pledge, unless such bills shall be paid when the same shall respectively become due.

9. PROVIDED also, and be it further enacted, that the penalty by this Act annexed to the commission of any offence intended to be guarded against by this Act shall not extend or be construed to extend to any partner or partners, or other person or persons of or belonging to any partnership, society, or firm, except only such partner or partners, person or persons, as shall be accessory or privy to the commission of such offence, anything herein contained to the contrary in anywise notwithstanding.

10. PROVIDED also, and be it further enacted, that nothing in this Act contained, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall hinder, prevent, lessen, or impeach any remedy at law or in equity which any party or parties aggrieved by any offence against this Act might or would have had or have been entitled to against any such offender if this Act had not been made, nor any proceeding, conviction, or judgment had been had or taken thereupon; but nevertheless the conviction of any offender against this Act shall not be received in evidence in any action at law or suit in equity against such offender: And further, that no person shall be liable to be convicted by any evidence whatever as an offender against this Act, in respect of any act, matter, or thing done by him, if he shall at any time previously to his being indicted for such offence have disclosed any such matter or thing on oath under or in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding in or to which he shall have been a party, and which shall have been *bonâ fide* instituted by the party aggrieved by the act, matter, or thing which shall have been committed by such offender aforesaid.

An Act to amend the Law relating to Advances bonâ fide made to Agents intrusted with Goods.

[5 & 6 Vict. c. 39, 30th June, 1842.]

WHEREAS by an Act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An Act to alter and amend an Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agree-

"ments in relation to goods, wares, and merchandise intrusted to "factors or agents," validity is given, under certain circumstances, to contracts or agreements made with persons intrusted with and in possession of the documents of title to goods and merchandise; and consignees making advances to persons abroad who are intrusted with any goods and merchandise are entitled, under certain circumstances, to a lien thereon; but under the said Act and the present state of the law advances cannot safely be made upon goods or documents to persons known to have possession thereof as agents only: And whereas by the said Act it is amongst other things further enacted, "that it shall be lawful to and for any person to contract with any agent intrusted with any goods, or to whom the same may be consigned, for the purchase of any such goods, and to receive the same of and to pay for the same to such agent; and such contract and payment shall be binding upon and good against the owner of such goods, notwithstanding such person shall have notice that the person making such contract, or on whose behalf such contract is made, is an agent; provided such contract or payment be made in the usual and ordinary course of business, and that such person shall not, when such contract is entered into or payment made, have notice that such agent is not authorised to sell the same, or to receive the said purchase money": And whereas advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bonâ fide* advances upon goods and merchandise as by the said recited Act is given to sales, and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should in all cases where such owners by the said recited Act or otherwise would be bound by a contract or agreement of sale be in like manner bound by any contract or agreement of pledge or lien for any advances *bonâ fide* made on the security thereof: And whereas much litigation has arisen on the construction of the said recited Act, and the same does not extend to protect exchanges of securities *bonâ fide* made, and so much uncertainty exists in respect thereof that it is expedient to alter and amend the same, and to extend the provisions thereof, and to put the law on a clear and certain basis: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and such contract or agreement shall be binding upon and good against the owner of

such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent.

2. AND be it enacted, that where any such contract or agreement for pledge, lien, or security shall be made in consideration of the delivery or transfer to such agent of any other goods or merchandise, or document of title, or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien and security for or in respect of a previous advance by virtue of some contract or agreement made with such agent, such contract and agreement, if *bonâ fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance within the true intent and meaning of this Act, and shall be as valid and effectual, to all intents and purposes, and to the same extent, as if the consideration for the same had been a *bonâ fide* present advance of money: Provided always, that the lien acquired under such last-mentioned contract or agreement upon the goods or documents deposited in exchange shall not exceed the value at the time of the goods and merchandise which, or the documents of title to which, or the negotiable security which shall be delivered up and exchanged.

3. PROVIDED always, and be it enacted, that this Act, and every matter and thing herein contained, shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges, as shall be made *bonâ fide*, and without notice that the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *malâ fide* in respect thereof against the owner of such goods and merchandise; and nothing herein contained shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge shall be given, nor to authorise any agent intrusted as aforesaid in deviating from any express orders or authority received from the owner; but that for the purpose and to the intent of protecting all such *bonâ fide* loans, advances, and exchanges as aforesaid (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority), and to no further or other intent or purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods.

4. AND be it enacted, that any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant, or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this Act; and any agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of

such agent's having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been intrusted with the possession of the goods represented by such document of title as aforesaid ; and all contracts pledging or giving a lien upon such document of title as aforesaid shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relates ; and such agent shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody, or shall be held by any other person subject to his control or for him or on his behalf ; and where any loan or advance shall be *bonâ fide* made to any agent intrusted with and in possession of any such goods or documents of title as aforesaid, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, and such goods or documents of title shall actually be received by the person making such loan or advance, without notice that such agent was not authorised to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title within the meaning of this Act, though such goods or documents of title shall not actually be received by the person making such loan or advance till the period subsequent thereto ; and any contract or agreement, whether made direct with such agent as aforesaid, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such agent ; and any payment made, whether by money or bills of exchange, or other negotiable security, shall be deemed and taken to be an advance within the meaning of this Act ; and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this Act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.

5. PROVIDED always, and be it enacted, that nothing herein contained shall lessen, vary, alter, or affect the civil responsibility of an agent for any breach of duty or contract, or non-fulfilment of his orders or authority in respect of any such contract, agreement, lien, or pledge as aforesaid.

6. PROVIDED always, and be it enacted, that if any agent intrusted as aforesaid shall contrary to or without the authority of his principal in that behalf, for his own benefit and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or documents of title so intrusted to him as aforesaid, as and by way of a pledge, lien, or security, or shall, contrary to or without such authority, for his own benefit and in violation of good faith, accept any advance on the faith of any contract or agreement to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, every such agent shall be deemed guilty of a misdemeanour, and being convicted thereof, shall be sentenced to transportation for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award ; and every clerk or other person who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer,

or delivery, or in accepting or procuring such advance as aforesaid, shall be deemed guilty of a misdemeanour, and being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court shall award as hereinbefore last mentioned: Provided nevertheless, that no such agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bills of exchange drawn by or on account of such principal, and accepted by such agent: Provided also, that the conviction of any such agent so convicted as aforesaid shall not be received in evidence in any action at law or suit in equity against him; and no agent intrusted as aforesaid shall be liable to be convicted by any evidence whatsoever in respect of any act done by him, if he shall, at any time previously to his being indicted for such offence, have disclosed such act, on oath, in consequence of any compulsory process of any court of law, or equity in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioner of bankrupt.

7. PROVIDED also, and be it enacted, that nothing herein contained shall prevent such owner as aforesaid from having the right to redeem such goods or documents of title pledged as aforesaid, at any time before such goods shall have been sold, upon repayment of the amount of the lien thereon, or restoration of the securities in respect of which such lien may exist, and upon payment or satisfaction to such agent, if by him required, of any sum of money for or in respect of which such agent would by law be entitled to retain the same goods or documents, or any of them, by way of lien as against such owner, or to prevent the said owner from recovering of and from such person with whom any such goods or documents may have been pledged, or who shall have any such lien thereon as aforesaid, any balance or sum of money remaining in his hands as the produce of the sale of such goods, after deducting the amount of the lien of such person under such contract or agreement as aforesaid: Provided always, that in case of the bankruptcy of any such agent the owner of the goods which shall have been so redeemed by such owner as aforesaid shall, in respect of the sum paid by him on account of such agent for such redemption, be held to have paid such sum for the use of such agent before his bankruptcy, or in case the goods shall not be so redeemed the owner shall be deemed a creditor of such agent for the value of the goods so pledged at the time of the pledge, and shall, if he shall think fit, be entitled in either of such cases to prove for or set off the sum so paid, or the value of such goods, as the case may be.

8. AND be it enacted, that in construing this Act the word "person" shall be taken to designate a body corporate or company as well as an individual; and that words in the singular number shall, when necessary to give effect to the intention of the said Act, import also the

plural, and *vice versa*; and words used in the masculine gender shall, when required, be taken to apply to a female as well as a male.

An Act to amend the Factors' Acts.

[40 & 41 Vict. c. 39, 10th August, 1877.]

WHEREAS doubts have arisen with respect to the true meaning of certain provisions of the Factors' Acts, and it is expedient to remove such doubts and otherwise to amend the said Acts, for the better security of persons buying or making advances on goods, or documents of title to goods, in the usual and ordinary course of mercantile business:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In this Act, the expression "the principal Acts" means the following Acts; that is to say,

The Act of the 4th Geo. IV. (1823) c. 83.

The Act of the 6th Geo. IV. (1825) c. 94.

The Act of the 5th and 6th of Her Majesty (1842), c. 39.

And the said Acts and this Act may be cited for all purposes as the "Factors' Acts, 1823 to 1877."

2. Where any agent or person has been intrusted with and continues in the possession of any goods, or documents of title to goods, within the meaning of the principal Acts as amended by this Act, any revocation of his intrustment or agency shall not prejudice or affect the title or rights of any other person who, without notice of such revocation, purchases such goods, or makes advances upon the faith or security of such goods or documents.

3. Where any goods have been sold, and the vendor or any person on his behalf continues or is in possession of the documents of title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor or any person or agent intrusted by the vendor with the goods or documents within the meaning of the principal Acts as amended by this Act so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person intrusted by the vendee with the goods or documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold.

4. Where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge, or disposition of such goods or documents by such vendee so in possession or by any other person or agent intrusted by the vendee with the documents within the meaning of the principal Acts as amended by this Act shall be as valid and effectual as if such vendee

or other person were an agent or person intrusted by the vendor with the documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods.

5. Where any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bonâ fide* and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

6. This Act shall apply only to acts done and rights acquired after the passing of this Act.

An Act to amend the Law of Partnership.

[28 & 29 Vict. c. 86, 5th July, 1865.]

WHEREAS it is expedient to amend the law relating to Partnership: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.

2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

3. No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

4. No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt,

be deemed to be a partner of or be subject to the liabilities of the person carrying on such business.

5. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied.

6. In the construction of this Act, the word "person" shall include a partnership firm, a joint stock company, and a corporation.

An Act to amend the Law in respect of the Sale and Purchase of Shares in Joint Stock Banking Companies.

[30 Vict. c. 29, 17th June, 1867.]

WHEREAS it is expedient to make provision for the prevention of contracts for the sale and purchase of shares and stock in joint stock banking companies of which the sellers are not possessed, or over which they have no control:

May it therefore please your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

1. That all contracts, agreements, and tokens of sale and purchase which shall, from and after the first day of July one thousand eight hundred and sixty-seven, be made or entered into for the sale or transfer, or purporting to be for the sale or transfer, of any share or shares, or of any stock or other interest, in any joint stock banking company in the United Kingdom of Great Britain and Ireland constituted under or regulated by the provisions of any Act of Parliament, royal charter, or letters patent, issuing shares or stock transferable by any deed or written instrument, shall be null and void to all intents and purposes whatsoever, unless such contract, agreement, or other token shall set forth and designate in writing such shares, stock, or interest by the respective numbers by which the same are distinguished at the making of such contract, agreement, or token on the register or books of such banking company as aforesaid, or where there is no such register of shares or stock by distinguishing numbers, then unless such contract, agreement, or other token shall set forth the person or persons in whose name or names such shares, stock, or interest shall at the time of making such contract stand as the registered proprietor thereof in the books of such

banking company ; and every person, whether principal, broker, or agent, who shall wilfully insert in any such contract, agreement, or other token any false entry of such numbers, or any name or names other than that of the person or persons in whose name such shares, stock, or interest shall stand as aforesaid, shall be guilty of a misdemeanour, and be punished accordingly, and, if in Scotland, shall be guilty of an offence punishable by fine or imprisonment.

2. Joint stock banking companies shall be bound to show their list of shareholders to any registered shareholder during business hours from ten of the clock to four of the clock.

3. This Act shall not extend to shares or stock in the Bank of England or the Bank of Ireland.

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